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No. 09-1360

IN THE

Supreme Court of the United States

TOTES-ISOTONER CORPORATION,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Harmonized Tariff Schedule of the United States (HTSUS) is a federal statute that classifies thousands of kinds of imported merchandise and imposes *ad valorem* customs duties based upon those governmental classifications. Dozens of HTSUS provisions for footwear and apparel impose rates of *ad valorem* duty which differ based solely on the gender or age of the persons who will use the merchandise. Petitioner challenged the constitutionality of HTSUS provisions which impose a 14% *ad valorem* rate on "men's" seamed leather gloves, but only a 12.6% *ad valorem* rate on seamed leather gloves for "other persons," *i.e.*, females and male children. The questions presented are:

1. Whether the HTSUS provisions discriminate facially on the basis of gender or age.

2. Whether, if the HTSUS does not facially discriminate, a "different rule" of pleading applies to equal protection claims in the areas of tariff and tax law such that governmental intent to discriminate can never be inferred from disparate impact on similarly situated parties.

3. Whether a corporate taxpayer has first-party standing to assert an equal protection violation based on the gender or age of those who use its imported merchandise.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, counsel for Petitioner certify that Totes-Isotoner Corporation has no parent corporation and there are no publicly held companies owning 10% or more of the Petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Totes-Isotoner Corporation, which paid 14% *ad valorem* customs duties on seamed leather gloves it imported for men, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-29a) is reported at 594 F.3d 1346 (Fed. Cir. 2010). The initial opinion of the United States Court of International Trade (CIT) dismissing this case without prejudice (Pet. App. 49a-71a) is reported at 569 F. Supp. 2d 1315 (Ct. Int'l Trade 2008), and the CIT's order denying reconsideration (Pet. App. 30a-48a) is reported at 580 F. Supp. 2d 1371 (Ct. Int'l Trade 2008).

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1 provides in relevant part:

> No state shall * * * deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. V provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

The Harmonized Tariff Schedule of the United States (HTSUS) provides in relevant part:

HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES CHAPTER 42

4203 Articles of apparel and clothing accessories, of leather or of composition leather:

* * *

Gloves, mittens and mitts:

* * *

Other:

4203.29 Other:

Other:

Other [than seamed]:

Other:

4203.29.30	*Men's . . . 14%*	
	For other persons:	
4203.29.40	Not lined: . . .	*12.6%*
4203.29.50	Lined:	*12.6%*

(emphasis added).

That the HTSUS is a statute is established by 19 U.S.C. § 3004(c), which provides in relevant part:

(c) Status of Harmonized Tariff Schedule

(1) The following shall be considered to be statutory provisions of law for all purposes:

(A) The provisions of the Harmonized Tariff Schedule as enacted by this chapter.

(B) Each statutory amendment to the Harmonized Tariff Schedule.

(C) Each modification or change made to the Harmonized Tariff Schedule by the President under authority of law * * * .

STATEMENT

This equal protection case of first impression asks whether a corporate importer can state a claim for gender and age discrimination based on how the government imposes customs duties on the corporation's property. It is the first of more than 100 similar cases filed in the United States Court of International Trade (CIT) challenging the constitutionality of provisions in the Harmonized Tariff Schedule of the United States (HTSUS) which discriminate in taxation based on gender and age. More than $1 billion in claims for recovery of excess duty assessments are potentially at issue in these cases.[1]

Totes-Isotoner Corporation (Totes), an importer of men's seamed leather gloves, filed a complaint in the CIT under 28 U.S.C. § 1581(i), contending that certain provisions of the HTSUS unconstitutionally deny it the equal protection of the laws by imposing, without justification, a 14% *ad valorem* rate of duty on the "men's" seamed leather gloves which Totes imports, but only a 12.6% *ad valorem* rate of duty on seamed leather gloves of the same class which are imported "for other per-

[1] *See, e.g.*, Michael Barbaro, *In Men's and Women's Apparel, All Tariffs Aren't Created Equal*, N. Y. Times, Apr. 28, 2007, at A1.

sons" (*i.e.*, females and male children). As importer of record of men's gloves, Totes is personally liable for the payment of the customs duties assessed at the 14% rate. 19 C.F.R. § 141.1. Totes' complaint seeks a judicial declaration that the challenged HTSUS provisions are unconstitutional, and requests a refund of excess duties assessed. Totes' complaint arises under the Due Process Clause of the Constitution's Fifth Amendment, which incorporates constitutional equal protection guarantees.[2]

The fundamental guarantee of equal protection is "that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Thus, "The Equal Protection Clause applies only to taxation which in fact bears unequally on *persons or property* of the same class." *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336, 341 (1989) (emphasis added; quotation and citation omitted). It is similarly "well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment." *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985) (citation omitted). As this Court has made abundantly clear,

> We expect * * * legislative or regulatory classifications [concerning property

---

[2] While "the Fifth Amendment contains no Equal Protection Clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (quotation and citations omitted).

> assessment and taxation schemes] to apply "without respect to persons," to borrow a phrase from the judicial oath. See 28 U.S.C. § 453. As we explained long ago, the Fourteenth Amendment "requires that all persons subjected to * * * legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Hayes v. Missouri*, 120 U.S. 68, 71-72, 7 S. Ct. 350, 30 L. Ed. 578 (1887).

Engquist v. Or. Dep't of Agric., 553 U.S. 591, ___, 128 S.Ct. 2146, 2153 (2008). The government "may, if it chooses, * * * vary the rates of excise upon various products * * * . But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition." *Bell's G.R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890).

Totes alleges it is similarly situated to all persons who import merchandise classified by the HTSUS statute as seamed leather gloves, yet the statute treats Totes and its property less favorably because it imports seamed leather gloves for men.[3]

[3] The HTSUS is by its nature a law which establishes classes of merchandise for purposes of customs taxation. Yet the HTSUS does not make gender distinctions for all goods within the taxable classes it defines. Where, as here, it does make such a distinction, the distinction is subject to judicial scrutiny under equal protection doctrines.

Accordingly, Totes contends that the HTSUS facially discriminates against it and its property on the basis of gender and age in violation of equal protection guarantees. Moreover, as a taxpayer, Totes has first-party standing to seek damages in the form of tariff refunds to redress the economic harm it has suffered.

A. Statutory Background

The HTSUS was enacted by Subtitle B of Title I of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-148 (Aug. 23, 1988), and became effective on January 1, 1989.

The governmental classifications and rates of duty on seamed leather gloves which Totes challenges are but one of dozens of similar provisions in the HTSUS which impose different rates of duty on goods of the same class, based solely on the gender or age of the intended user.[4]

B. Proceedings Below

1. The CIT granted the government's motion to dismiss Totes' complaint on the ground that Totes

[4] For example, HTSUS subheading 6211.11.10 imposes a 27.8% rate of duty on "Swimwear: Men's or boys': Of man-made fibers," whereas HTSUS subheading 6211.12.10 imposes merely an 11.8% rate of duty on "Swimwear: Women's or girls': Of man-made fibers." HTSUS subheading 6403.91.60 imposes an 8.5% rate of duty on a detailed governmental classification covering "Tennis shoes, basketball shoes, training shoes and the like" for "men, youths and boys," but HTSUS subheading 6403.91.90 imposes a higher 10% rate of duty on the same class of merchandise imported for "other persons" (defined in the pertinent HTSUS sub-classifications as "women," "misses," and "children").

did not plead a sufficient equal protection claim under CIT Rule 8(a)(2) and the test outlined in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (holding that the "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to give the defendant fair notice of what the * * * claim is and the grounds upon which it rests." (quotation and citation omitted)).[5] In holding Totes' complaint insufficient, the CIT ruled that the challenged HTSUS provisions do not discriminate facially on the basis of gender or age, and that Totes was therefore required to plead "that the challenged tariff classifications distribute the burdens of the tax rate imposed in a way that disadvantages one sex as a whole, or has a disproportionate impact based on sex." Pet. App. 69a-70a. The CIT's holding was not based on the language of the statute, which uses an express gender term ("men's") to impose the higher rate of duty, but rather on the fact that the statutory test for classifying gloves as "men's" or "for other persons" is based on the gloves' "principal use," rather than their "actual use."[6] Pet. App. 67a.

[5] CIT Rule 8(a) is identical to FRCP 8(a).

[6] The tariff provisions assailed by Totes are "principal use" provisions, *i.e.*, as a matter of law, goods classified as "men's gloves" are principally used by men. This follows from Additional U.S. Note of Interpretation 1(a) of the HTSUS, which has statutory force and provides in pertinent part as follows:

> 1. In the absence of special language or context which otherwise requires—
>
> (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance

Instead of following this Court's established doctrine that statutes are either facially discriminatory or facially neutral, the CIT introduced a third, Cartesian category into equal protection jurisprudence, holding that the HTSUS provisions at issue "are, at worst, *'in between' classifications* that impose a facially discriminatory tax and classifications that are not facially discriminatory * * * ." Pet App. 69a (emphasis added).

The CIT conceded, "To be clear, were this a facially discriminatory tax, Plaintiff's pleadings could be sufficient * * * ." *Id.* The CIT also acknowledged that the challenged tariff provisions contain express gender classifications: "Totes' Complaint does allege the express use of gender in the tariff classification scheme," and "[W]e do not ignore the fact that the tariff schedule *makes an express reference to gender.*" *Id.* (emphasis added). Nevertheless, the CIT found that Totes' pleading was insufficient under the test set forth in *Bell Atlantic.*

As discussed *infra*, the Federal Circuit upheld the dismissal, but on a different basis than relied upon by the CIT.

2. Whether a challenged statute facially discriminates on the basis of gender or age has long been a pivotal issue in equal protection jurisprudence. It is settled law that plaintiffs raising an equal protection claim "must allege that a government actor intentionally discriminated against them on the basis of race, national origin or gen-

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with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use * * * .

der." *Hayden v. Nassau*, 180 F.3d 42, 48 (2d Cir. 1999). In a different case, the Federal Circuit summarized this Court's decisions by noting that a plaintiff may carry its burden of showing intentional discrimination in any of three ways:

> Intentional discrimination, however, can be demonstrated in any one of three different ways. The first involves a facially neutral statute that violates equal protection "if it was motivated by discriminatory animus and its application results in discriminatory effect." [*Hayden*, 180 F.3d at 48] (citing *Arlington Heights v. Metro. Hous. Dev't. Corp.*, 429 U.S. 252, 264-65, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977)). The second involves a facially neutral law that violates equal protection "if it is applied in a discriminatory fashion." *Id.* (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 30 L. Ed. 220, 6 S. Ct. 1064 (1886)). *Finally, "a law or policy is discriminatory on its face if it expressly classifies persons on the basis of race or gender." Id.* (citing *Adarand* [*Constructors v. Pena*, 515 U.S. 200, 213 (1995)]).

Berkley v. United States, 287 F.3d 1076, 1084 (Fed. Cir. 2002) (emphasis added). Tellingly, the Federal Circuit's majority decision completely ignored its decision in *Berkley*.[7]

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[7] Where a challenged provision facially discriminates on the basis of gender, the burden shifts to the government, which must show an "exceedingly persuasive" justification for the discriminatory measure. As explained in *United States v. Virginia*, 518 U.S. 515 (1996) (VMI),

> To summarize the Court's current directions for cases of official classification based on gender: Focusing on

Thus, if the challenged tariff provisions facially discriminate according to gender or age, it follows, under the tests traditionally employed by this Court, that Totes' complaint was sufficient and should not have been dismissed. Rather, the burden should have shifted to the government to show the exceedingly persuasive justification for the discrimination, including the important governmental objectives served, and the substantial relationship of the discrimination to the achievement of those objectives.

3. The Federal Circuit upheld the CIT's dismissal, while rejecting the CIT's reasoning. The two-judge majority held that the CIT had "entirely misse[d] the point" in stating that Totes was required to plead that the challenged tariff provisions "distribute the burdens of the tax rate imposed in a way that disadvantages one sex as a whole, or has a disproportionate impact based on sex." Pet App. 17a. Rejecting this "theory of purchaser equality" as "untenable," the Federal Circuit held, "The claimed discrimination is based on the sex of the glove users, not the sex of the glove purchasers." *Id.*

> the differential treatment or denial of opportunity for which relief is sought, the reviewing Court must determine whether the proffered justification is exceedingly persuasive. * * * The burden of justification is demanding and it rests entirely on the [government]. * * * The [government] must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.* * * The justification must be genuine, not hypothesized or invented post hoc in response to litigation.

VMI at 532-33 (quotations and citations omitted).

Because the HTSUS requires that provisions classifying imported goods by "use" be governed by the principal use of the class of merchandise in question, a statutory determination that gloves are classifiable as "men's" under HTSUS subheading 4202.29.30 necessarily establishes that the higher duty rate is imposed by virtue of the gender of the users thereof.[8]

Furthermore, the Federal Circuit presumed (albeit without explicitly holding) that Totes' complaint had *satisfied* the requirement of pleading a disparate impact on glove users of different sexes. The Federal Circuit noted that, in certain types of cases (*e.g.*, jury selection, employment, fair housing), the mere allegation of a disparate impact was sufficient to make out a *prima facie* case of an equal protection violation. Pet App. 19a-20a. However, the Federal Circuit majority held that "*a different approach is required in the tariff context.*" Pet. App. 20a (emphasis added). Under that approach, the court below opined, Totes was required to sustain a heightened burden of pleading: "[A]lthough disparate impact can be relevant to the determination of a purpose to discriminate, we think that *in the area of taxation and tariffs*, something more than disparate impact is required to establish a purpose to discriminate for the purposes of pleading an equal protection violation." Pet App. 20a (emphasis added). Thus, even assum-

[8] The statutory classification of Totes' gloves under HTSUS subheading 4203.29.30 is not in dispute. Moreover, the government's determinations concerning the classification of imported merchandise are by law presumed to be correct. 28 U.S.C. § 2639(a)(1); *United States v. Mead Corp.*, 533 U.S. 218 (2001).

ing *arguendo* that the challenged statutes were facially neutral, and that disparate impact was shown, the Federal Circuit imposed in tax and tariff cases heightened burdens of pleading and of proof, beyond those imposed in other equal protection cases. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). Under the Federal Circuit's renegade holding, equal protection plaintiffs challenging tariff and tax laws must in *all* cases plead (and thereafter prove) discriminatory animus, regardless of disparate impact, which is a bold new *per se* exception to equal protection jurisprudence.

The two judges comprising the Federal Circuit majority offered two reasons in support of this different approach to equal protection challenges in the tariff and tax areas. First, they noted the classifications in the HTSUS serve not only to raise revenue, but also to "promote particular trade policies negotiated with foreign countries." Pet App. 20a. Specifically, the Federal Circuit majority said the HTSUS was based on the international Harmonized System Description and Coding System (HS), which is developed internationally by the World Customs Organization (WCO) and provides a uniform system of product classifications. *Id.*[9] The Federal Circuit majority also noted:

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[9] However, the Federal Circuit failed to note that while the HS, as developed under WCO auspices, is a uniform system of classification, the HS does not include or prescribe duty rates, leaving the establishment of duty rates (and additional provisions further differentiating product classes) exclusively and independently to the individual member countries.

> The rates of duty applicable to different product classifications are the result of multilateral international trade negotiations and reflect reciprocal trade concessions and particularized trade preferences. The reasons behind different duty rates vary widely based on country of origin, the type of product, the circumstances under which the product is imported, and the state of the domestic manufacturing industry. Under such circumstances it is quite possible, even likely, that the different tariff rates for men's and other gloves reflect the fact that such gloves are in fact different products, manufactured by different entities in different countries with differing impacts on domestic industry.

Pet App. 21a.[10,11]

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[10] The Federal Circuit's observation regarding duty rates is not accurate. Although the United States, in tariff negotiations under World Trade Organization (WTO) auspices, binds its tariff rates at given levels—setting maximum bound rates of duty which cannot be exceeded without offering compensation to affected trading partners—the setting of the rate of duty to be assessed on goods imported into the United States remains solely a congressional prerogative. "The Congress shall have power to lay and collect taxes, duties, imposts, and excises * * * ." U.S. Const. art. I, § 8.

[11] The Federal Circuit did not explain, and Totes is at a loss to understand, how the fact that seamed leather gloves are made by different entities in different countries, with differing impacts on domestic industries, could make them different products for purposes of identical HTSUS language.

Second, the Federal Circuit majority's different approach to equal protection claims in the tariff and tax areas was grounded in the latitude traditionally accorded governments in drafting taxation schemes:

> Second, even if we were to regard the HTSUS schedule as simply designed to raise revenue, we again cannot assume that this differential treatment of different goods is invidious. It is well established that the federal government and the states have broad leeway in establishing classifications for purposes of taxation. The Supreme Court has long held that inherent in the power to tax is the power to discriminate in taxation. Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes. * * * The same is necessarily true with respect to the closely-related area of customs duties.

Pet. App. 22a (quotations and citations omitted). Thus, the lower court imposed an unprecedented equal protection burden requiring plaintiffs challenging tariff or tax laws to plead and prove actual government malice despite the level of manifest and admitted disparate impact. The Court should grant review to rectify the announcement of this incorrect *per se* exception to the equal protection doctrines established by the Court's precedents.

The need to plead such facts in the complaint is extraordinary, in light of the fact that by the Federal Circuit's own logic, the imposition of the higher duty results, as a matter of law, from a statutory determination of whom the principal

users of the gloves will be, and that those users (men) suffer disparate impact. Pet App. 18a.

Curiously, the Federal Circuit never addressed whether the challenged tariff provisions were facially discriminatory (which had been the principal thrust of Totes' appeal), nor did it even comment on the CIT's characterization of the challenged provisions as hybrid "in between" provisions. Instead, the Federal Circuit merely assumed the tariff provision for "men's" gloves to be facially neutral, stating that "because the challenged provisions of the HTSUS are not facially discriminatory, Totes is required to allege facts sufficient to establish a governmental purpose to discriminate between male and female users." Pet App. 24a.[12] The Court should grant review to determine the important question of whether a revenue statute discriminates on its face by linking different rates of exaction solely to express criteria of gender and age.

Circuit Judge Prost, concurring only in the result, rejected what she termed

> the majority's treatment of trade law as an exception to this country's equal protection jurisprudence and implication that a heightened legal standard applies only in the context of tariff schedules. I find the majority's position on this issue par-

[12] This conclusory passage was the only one in the Federal Circuit opinion that mentioned the issue of whether the challenged provisions were facially discriminatory. The Federal Circuit majority did not indicate whether, if the provisions in question are in fact facially discriminatory, Totes' complaint would be sufficient.

> ticularly difficult because it was never advocated by the Government, and is not responsive to Totes-Isotoner Corporation's * * * arguments on appeal.

Pet. App. 25a.

As a consequence of the confused and contradictory statements by the lower courts, Totes and many similarly-situated plaintiffs bringing equal protection challenges to discriminatory provisions of the HTSUS are at a loss to know (1) whether the challenged tariff provisions facially discriminate on the basis of gender or age, (2) whether the different burdens announced by this Court in challenging facial and non-facial discriminations continue to apply in the areas of taxation and tariffs, and (3) whether a heightened standard of pleading applies in such challenges. The Court should grant review to settle this enormous confusion.

4. As importer of the merchandise, Totes is personally liable for the payment of duties, and in fact paid duties at the higher rate for "men's" gloves classified under HTSUS subheading 4203.29.30. The CIT found that, as a taxpayer, Totes had both prudential and constitutional standing to maintain this action in order to challenge the constitutionality of the tariff provisions in question, and to seek refunds of the duties it paid. Pet. App. 53a-68a.

However, the Federal Circuit majority suggested that Totes did not have first-party standing to seek refunds of the taxes it paid, but instead only *jus tertii* standing "derivative" of men's equal protection rights. Pet. App. 10a, n.2. The Federal Circuit did so despite explicitly recognizing that Totes disclaimed *jus tertii* standing throughout

this litigation, and despite acknowledging that the men who wear the gloves have "no remedy" at law because they are not the importers of record and do not pay the exactions. *Id.* The Court should grant review to declare who, if anyone, has first-party standing to challenge the discriminatory duty rates in question.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER THE HTSUS FACIALLY DISCRIMINATES ON THE BASIS OF GENDER OR AGE.

A. The Federal Circuit's Determination That The HTSUS Does Not Facially Discriminate Conflicts With This Court's Decisions.

"Statutory classifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clause.'" *Craig v. Boren*, 429 U.S. 190, 197 (1976) (quoting *Reed v. Reed*, 404 U.S. 71, 75 (1971)). "To withstand constitutional challenge * * * classifications by gender must serve important governmental objectives and must be substantially related to achievement of these objectives." *Craig* at 197. There can be no serious debate that the HTSUS does not contain classifications by gender.

The starting point for determining whether the HTSUS facially discriminates on the basis of gender or age is the text of the statute itself. Where statutory language is express and clear, the inquiry ends there. *See, e.g., Carcieri v. Salazar*,

129 S. Ct. 1058 (2009). In construing a statute, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). The Court should look no further than the language of HTSUS subheading 4203.29 to search for an explicit classification. *See Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999) ("[W]here Congress has clearly stated its intent in the language of a statute, a court should not inquire further into the meaning of the statute."); *cf. Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (citing *Shaw v. Reno*, 509 U.S. 630, 642 (1993)) ("When racial classifications are explicit, no inquiry into legislative purpose is necessary.").

Both lower courts ignored this rule. First, the provisions at issue distinguish between "men's" gloves and gloves "for other persons." There is no hidden meaning or innuendo to be deciphered from the text of the statute: from a linguistic and logical perspective, "men's" means adult males and only adult males.[13] There could hardly be a stronger case of an express, facial distinction, which is discriminatory for purposes of equal protection, because differences in duty rates are linked solely to the gender and age attributes of the users for whom the gloves are imported. It is well-established that where a "statutory scheme 'provides that different treatment be accorded * * * on the basis of * * * sex[ ] it thus establishes a classification subject to scrutiny under the

[13] Absent contrary Congressional intent, terms in the tariff are construed according to their ordinary meaning. *United States v. Stone & Downer, Inc.*, 274 U.S. 225 (1927).

Equal Protection Clause.'" *Orr v. Orr*, 440 U.S. 268, 278 (1979) (quoting *Reed v. Reed*, 404 U.S. 71, 75 (1971)).

In enacting the HTSUS, Congress not only legislated classes of merchandise but also, in certain cases, enacted purely gender- and age-based divisions within the classes. It then imposed different duty rates based solely on those gender- and age-based divisions, in this case by imposing a higher rate of duty on "men's" seamed leather gloves than on seamed leather gloves for "other persons."

The CIT conceded that the statute contains an express discrimination based on gender. Pet App. 69a. The Federal Circuit did not question this holding.

The question of facial discrimination hinges not just on the express terminology but also on the objective of the statutory text. In *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), this Court held that the determination of whether a law facially discriminates starts and ends with the statutory text:

> [I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, see *Employment Div., Dept. of Human Resources of Ore. v. Smith*, [494 U.S. 872, 878-79 (1990)].* * * There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not

> discriminate on its face. *A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.*

Lukumi at 533 (emphasis added).

Here, the challenged statute solely and explicitly uses age- and gender-based classifications as the bases for the assessment of a higher rate of duty. Under the test proclaimed in *Lukumi*, the HTSUS "lacks facial neutrality" because it refers to gender ("men's") without a genderless meaning "discernable from the language or context."

Therefore, the Federal Circuit erred when it held that the challenged tariff provision was not facially discriminatory on the basis of gender or age, as the facial discrimination is evident from the plain meaning and context of the statute itself. Because the tariff provisions establish explicit classifications based on gender and age, this Court's precedents dictate that no inquiry into legislative purpose is necessary, and the burden shifts to the government to justify the classifications.

This Court has in recent years accepted cases to clarify the principles used in identifying facial discrimination under equal protection, and in interpreting the nation's customs laws.[14] It should grant review in this case to determine whether the challenged tariff provisions, which are but one set of dozens of tariff provisions being challenged in over 100 pending cases, violate the Constitution

[14] *See, e.g., United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999); *United States v. Mead Corp.*, 533 U.S. 218 (2001).

by discriminating facially on the basis of gender or age in violation of this country's fundamental equal protection guarantees. It is clearly a case of national significance that was wrongly decided below in violation of this Court's established doctrines.

B. The Federal Circuit's Determination That The HTSUS Does Not Facially Discriminate Conflicts With Other Circuit Court Decisions

The Federal Circuit's holding that the HTSUS does not facially discriminate conflicts with decisions of other circuits, most notably *Mfrs. Hanover Trust Co. v. United States*, 775 F.2d 459 (2d Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986). In *Manufacturers Hanover*, an estate challenged gender-based mortality tables the IRS utilized to determine estate taxes. The tables were designed to account for the different life spans of men and women, and produced different estate tax consequences according to the genders of the decedent and beneficiary. The Second Circuit squarely rejected the government's argument that the tax did not facially discriminate on the basis of gender because it applied to an estate rather than to people:

> [T]he government claims that the challenged regulations do not discriminate because "the tax here is assessed against an estate, a legal fiction that is separate and distinct from the decedent and that lacks any gender. It is a tax not on an individual * * * ." However, the mere fact that the taxed entity is an estate does not make it impossible for that tax to dis-

> criminate against men or women * * * . Estates and the laws governing them are a means of channeling effects upon individuals, and taxes on estates are just as capable, in principle, of discriminating against men or women as a tax on individuals. On a substantive level, therefore, there is no difficulty in challenging an estate tax on the ground that it discriminates against men or women.

Mfrs. Hanover, 775 F.2d at 463.[15] As the Second Circuit explained, "[U]nder the IRS practice of using gender-based mortality tables, similarly situated men and women are treated differently in a way that may affect the taxpayer's ultimate tax burden. This constitutes discrimination based on gender." *Id.* Accordingly, the Second Circuit proceeded to analyze the statute under intermediate scrutiny without engaging in the analysis undertaken to address facially neutral statutes, a decision squarely at odds with the Federal Circuit's determination in this case.

Just as a tax on an estate may be a way for "channeling effects upon individuals," so too may a tax or tariff on an imported article be a way for channeling effects upon individuals or classes of individuals. Where, as here, the statutory provisions establish discriminatory tariff rates grounded solely and explicitly in the gender or age of the individuals who will use the property, it fol-

[15] Likewise, as the Federal Circuit correctly acknowledged, import duties are clearly capable of channeling effects on people, as disparate impact on men who wear gloves is entailed from the statute.

lows that the statute facially discriminates. The Federal Circuit erred in failing to hold otherwise.

The Federal Circuit's decision conflicts with *Manufacturers Hanover* in another very important respect: the Federal Circuit ruled that taxation must always be reviewed under the rational basis test, whereas the Second Circuit correctly recognized that intermediate scrutiny is the proper test for reviewing gender-based taxation. According to the Federal Circuit,

> Totes argues that the tariff classification is unconstitutional because it discriminates between similar property—men's gloves and women's gloves. While the Supreme Court in *Allegheny Coal* and other cases has held that taxation of property cannot discriminate between items of property of the "same class," allegations of such discrimination are judged under the rational basis test.

Pet. App. 15a (citations omitted).

The Second Circuit reached the opposite conclusion:

> Contrary to the government's position, we do not apply the minimal rationality standard just because the case involves federal estate taxation. To support its claim that the standard should be one of minimal rationality, the government cites primarily equal protection challenges to tax regulations that did not involve gender discrimination. * * * We find this authority unpersuasive.

Mfrs. Hanover at 464 (citations omitted).

As the Federal Circuit has exclusive nationwide jurisdiction over tariff cases, a circuit conflict involving such a case will rarely arise. In this case, however, the clear conflict between the Federal Circuit's approach to gender discrimination in tax cases and that taken by a sister circuit with respect to both (1) facial discrimination in taxing statutes, and (2) the level of judicial scrutiny to be accorded such discrimination, provides another reason this Court should grant certiorari to clarify the applicable standards.

II. THE FEDERAL CIRCUIT'S DETERMINATION THAT A GOVERNMENTAL INTENT TO DISCRIMINATE CAN NEVER BE INFERRED FROM DISPARATE IMPACT IN THE AREAS OF TARIFF AND TAX LAW IS CLEARLY ERRONEOUS AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT.

The Federal Circuit's majority decision properly identified the well-established rule that "official action will not be held unconstitutional solely because it results in a * * * disproportionate impact. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious * * * discrimination." *Village of Arlington Heights v. Metro. Hous. Dev't. Corp.*, 429 U.S. 252, 264-65 (1977) (quotation omitted). Pet. App. 19a. However, the majority also ruled that "although disparate impact can be relevant to the determination of a purpose to discriminate, we think that in the area of taxation and tariffs, something more than disparate impact is required to establish a purpose to discriminate for the purposes of pleading an equal protection violation." Pet. App. 23a.

That ruling directly conflicts with this Court's holding in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993):

> [S]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. *A tax on wearing yarmulkes is a tax on Jews.*

Id. at 270 (emphasis added). The same would be true of a tax on the yarmulke itself. It follows that a higher duty on gloves imported for men is not only a discriminatory duty on men for purposes of equal protection, but also a discriminatory duty on importers such as Totes, who are the only persons who have Article III standing to assert the equal protection violation. The Court should grant review to indicate whether the principle announced in *Bray* applies in cases challenging discriminatory tariffs, or whether the enhanced pleading obligations imposed under the Federal Circuit's different approach to tariff cases apply.

The reasons the Federal Circuit majority proffers for imposing a higher burden in equal protection challenges to tariff statutes are highly problematic, and represent a sharp departure from established equal protection jurisprudence. For example, the majority reasoned that the duty differentials were justified because the differing rates were allegedly arrived at through a process of negotiation formed by official trade policy, or could putatively be based on the desire to protect domestic industries or favor certain foreign coun-

tries. Pet. App. 20a. However, as explained in *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985),

> [A]cceptance of [the State's] contention that promotion of domestic industry is always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause in this context. A State's natural inclination frequently would be to prefer domestic business over foreign. If we accept the State's view here, then any discriminatory tax would be valid if the State could show it reasonably was intended to benefit domestic business. A discriminatory tax would stand or fall depending primarily on how a State framed its purpose—as benefiting one group or as harming another. This is a distinction without a difference * * * .

Id. at 882 (footnote omitted).

Moreover, as the Court explained in a case holding an employer's policy facially discriminatory when it barred fertile women, but not men, from jobs involving potential lead exposure,

> [The company's] policy is not neutral because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females. Moreover, the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on

> why the employer discriminates but rather on the explicit terms of the discrimination. In [*Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971)], the motives underlying the employers' express exclusion of women did not alter the intentionally discriminatory character of the policy. Nor did the arguably benign motives lead to consideration of a business necessity defense.

Int'l Union v. Johnson Controls, 499 U.S. 187, 199 (1991).

Likewise, equal protection guarantees would be eviscerated if the government could defeat Totes' claim simply by referring to the likelihood that a differentiation was motivated by protectionism, favoritism, and official policy. As *Ward* explained, "The second purpose found by the courts below to be legitimate was the encouragement of capital investment in the [State's] assets and governmental securities specified in the statute. We do not agree that this is a legitimate state purpose when furthered by discrimination." *Id.* at 882.

Accordingly, otherwise unobjectionable government goals can violate equal protection when they are, as here, furthered by opportunistic discrimination in the form of *ad valorem* exactions based facially on age or gender. Indeed, there is no apparent reason all of the government's pursuits and goals could not have been easily achieved through age- and gender-neutral tariff rates.

This is not to say that age- or gender-based discrimination in tariff rates are *per se* illegitimate. When such a discrimination is shown, the gov-

ernment has the opportunity (and the burden) of showing (in the case of gender discrimination) an exceedingly persuasive justification for such discrimination, including an important governmental purpose, and of demonstrating that the discriminatory means employed are substantially related to the achievement of those objectives. *See, e.g.*, *VMI*; *Craig*. However, the approach the Federal Circuit has undertaken in this case stands this inveterate test on its head, effectively shifting to equal protection plaintiffs the burden historically imposed on the government to defend such challenges.

Furthermore, the majority's prolix discussion explaining that discriminatory duty rates resulted from extended multilateral negotiations is manifestly incorrect. The HS ensures uniformity of classification to the six-digit level, and in the instant case that level of classification does not specify gender. This is proven by the following HS provisions, which indicate the U.S. government independently chose to enact gender- and age-based duty rates:[16]

> 4203 Articles of apparel and clothing accessories, of leather or of composition leather.
>
> 4203.10—Articles of apparel
> Gloves, mittens and mitts:

[16] *See* http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/HarmonizedSystem/2007/0842-2007E.pdf, and http:// www.ustr.gov/trade-topics/industry-manufacturing/industrial-tariffs/tariff-schedules).

4203.21—Specially designed for use in sports
4203.29—Other
4203.30—Belts and bandoliers
4203.40—Other clothing accessories

The international HS nomenclature does not prescribe rates of duty to be applied to goods described therein. The setting of a duty rate is, in the United States, purely a function of Congress, which under the Constitution has the sole power to impose tariffs on imports.

Therefore, the gender- and age-based classifications and duty differentials promulgated under the glove provision at issue here are purely domestic sub-classifications which cannot be explained away by referring to the international origins of the tariff nomenclature. Furthermore, while the United States may have entered into international agreements to bind its tariff rates to maximum levels, the actual tariff rates imposed are purely creatures of congressional enactment, and in that respect no different from any other law of the United States susceptible to equal protection scrutiny. The discrimination complained of arises purely from an act of Congress, not from any international agreement or arrangement.

This Court should therefore grant review to determine whether the different approach to pleading equal protection claims in tariff and tax cases is consistent with *Bray* and this Court's equal protection jurisprudence.

III. THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER A CORPORATE TAXPAYER HAS FIRST-PARTY STANDING TO STATE AN EQUAL PROTECTION CLAIM ALLEGING IT SUFFERED HARM FROM DISCRIMINATION BASED ON GENDER OR AGE.

As an importer of record legally responsible for the payment of duties, Totes possesses first-party standing to challenge the constitutionality of the statute that imposes the tax. Totes contends that the HTSUS discriminates against Totes without justification in violation of equal protection guarantees, and that Totes has suffered a direct injury as a result of enforcement of the statute. Traditionally, this satisfies the requirements for first-party taxpayer standing to challenge the constitutionality of a statute. Indeed, the courts below had no difficulty finding that Totes had constitutional standing to maintain this action under the test set out in *Valley Forge Christian v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982),[17] as well as prudential standing under the "zone of interest" test articulated in *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-53 (1970).

[17] In *Valley Forge*, this Court noted that:

> "[A]t an irreducible minimum, Art. III requires a party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putative illegal conduct of the defendant . . . and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision."

Id. at 472 (citation, brackets, and quotation marks omitted).

A second prong of the prudential standing test seeks to ensure that plaintiffs before the court are asserting their own rights and are proper and vehement advocates of the issues presented. Totes is a taxpayer seeking the recovery of a tax assessed against it at a discriminatory rate based on gender- and age-discriminations, and possesses such standing as the CIT correctly held.

The Federal Circuit, however, held otherwise, suggesting that Totes only had third-party standing, grounded in the doctrine of *jus tertii*. This finding appears related to Totes' status as a corporate taxpayer, rather than a natural person. However, it is well-established that corporate plaintiffs may have first-party standing to bring equal protection challenges based on suspect classifications involving natural persons.

In *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702 (2d Cir. 1982), *cert. denied*, 459 U.S. 857 (1982), the court held that a corporation had standing to claim direct race discrimination under the Equal Protection Clause. The plaintiff in *Hudson Valley*, a non-profit theatrical company organized "to produce theatrical and artistic productions * * * which particularly reach and involve the Black and Hispanic communities," claimed that it was denied funding based on racial motivations related to its target audiences. The district court dismissed the equal protection claim on the ground that the company itself had no race. As the Second Circuit explained, the district court had "reasoned that a corporation, as a faceless creature of the state, may not assert claims of racial discrimination under the Fourteenth Amendment on its own behalf, and cannot be the 'target' of racial dis-

crimination." *Id.* at 704 (quotation marks omitted).

The district court relied on dicta from this Court's decision in *Arlington Heights*, 429 U.S. 252 (1977), which involved a plaintiff that claimed third-party *jus tertii* standing, and reflected that "[a]s a corporation, [plaintiff] has no racial identity and cannot be the direct target of the petitioners' alleged discrimination." *Id.* at 263. However, the Second Circuit noted that "[this] sentence was of only academic importance and we do not believe that the Supreme Court would slavishly apply it so as to deny [the theater company] its day in court." *Hudson Valley* at 704. "It is not apparent why a corporation, although entitled to advance equal protection challenges based on inequality in taxation or regulation, should lack standing to complain of discrimination because of its activities or stock ownership based on racial grounds—the core of the equal protection clause." *Id.* at 706 (footnote omitted).[18] *See also Gersman v.*

[18] *See also id.* at 707-08 (concurring decision); *Young Apts., Inc. v. Town of Jupiter*, 529 F.3d 1027 (11th Cir. 2008) (holding that residential corporation had first-party standing to claim equal protection violation on the basis of race and could pursue remedy based on its own harm; collecting cases); *cf. Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 14 (1st Cir. 1979), *vacated on other grounds*, 454 U.S. 807 (1981) (ruling that to invoke the protections of 42 U.S.C. § 1981, "one need not be a member of the racial class protected by the statute and one need not even be able to identify any specific member of the class who suffered or may suffer discrimination."); *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 473 (2006) ("[w]e have no occasion to determine whether, as a corporation [that settled its claims the corporation] could have brought suit under § 1981. We note, however, that the Courts of Appeals to have considered the

Group Health Ass'n, Inc., 931 F.2d 1565 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068 (1992), *adhered to on remand*, 975 F.2d 886 (1992) (stating that despite the *dicta* in *Arlington Heights*, "the determination whether a corporation has a racial identity is not determinative of whether that corporation has standing to bring a discrimination claim"). The same holds true here.

Under the Federal Circuit's logic, an importer would also lack first-party standing to assert discrimination on the basis of religion if skullcaps for Jews, Muslims, and Catholics were subject to different rates of duty, inoculating the tariff schedule from strict scrutiny as well.

Perhaps even more directly than the corporate plaintiffs in *Hudson Valley* and *Gersman*, Totes is directly and quantifiably injured by the discrimination, does not rely on *jus tertii* standing, and is the best positioned party to advance the gender discrimination claim. Accordingly, the Court should grant review to determine whether Totes has first-party standing to allege an equal protection claim based on gender or age.

A second difficulty with the Federal Circuit's *jus tertii* finding is that the Federal courts have entertained *jus tertii* standing in limited circumstances when (1) the *jus tertii* plaintiff and the party whose rights it is asserting have a close relationship; (2) the *jus tertii* plaintiff has suffered an injury in fact; and (3) there is a substantial hindrance to the first-party filing its own claim. *See*,

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issue have concluded that corporations may raise § 1981 claims. *See, e.g., Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (CA2 1982).").

e.g., *Powers v. Ohio*, 499 U.S. 400 (1991). With respect to the third prong of this test—hindrance to the first-party filing its own claim—the majority held this condition was satisfied because "[t]he purchasers have no remedy to challenge the tariff classification." *See, e.g.*, *Emerald Int'l Corp. v. United States*, 54 Fed. Cl. 674 (2002) (holding discretion of taxpayer to pass on unconstitutional tax to subsequent purchaser entails that subsequent purchaser's injury did not arise from government action; Article III traceability requirement not satisfied); *accord Ont. Power Generation, Inc. v. United States*, 54 Fed. Cl. 630 (2002), *aff'd on other grounds*, 369 F.3d 1298 (Fed. Cir. 2004). Pet. App. 10a. However, it is impossible for Totes to possess *jus tertii* standing when the parties whose interests it putatively represents have no remedy themselves and thereby lack Article III standing in their own right.[19] In *Craig*, *Powers*,

[19] *See, e.g., Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 944-45 (D.C. Cir. 2004):

> [The associations] claim that the regulations compel their member coaches and athletic directors to act as "involuntary participants" in illegal discrimination. An "involuntary participant," however, has standing only to the extent that the victims of the alleged discrimination themselves have standing. *See Fraternal Order of Police v. United States*, 332 U.S. App. D.C. 49, 152 F.3d 998, 1002 (D.C. Cir. 1998) ("Where a person is effectively used by the government to implement a discriminatory scheme, he may . . . attack that scheme by raising a third party's constitutional rights.") . . . . As we have discussed at length, the alleged victims of the alleged discrimination—*i.e.*, the male student-athletes and coaches that [the associations] represent—lack standing in their own

and every single other decision issued by this Court and lower federal courts, *jus tertii* standing was only recognized when the party whose interests the plaintiff was representing possessed a cognizable and justiceable claim in its own right.

The Court should grant review to resolve the question of whether a corporate plaintiff such as Totes has first-party standing to assert an equal protection claim grounded in gender and age discrimination based on the identities of the persons for whom it imports gloves. If Totes does not, then no party does, and the gender-based duties appearing in the HTSUS will be immune from equal protection review. This is an issue of national importance that warrants the attention of this Court.

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right. The "involuntary participant" theory cannot confer standing upon [the associations] that these student-athletes and coaches do not independently possess.

CONCLUSION

For the reasons set forth herein, this Court should grant a writ of certiorari to the U.S. Court of Appeals for the Federal Circuit to consider the questions presented in this petition.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2009-1113

TOTES-ISOTONER CORPORATION,

Plaintiff-Appellant,

—v.—

UNITED STATES,

Defendant-Appellee.

Judgment

On Appeal from the United States Court of International Trade in Case No(s). 07-0001

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

/s/ JAN HORBALY /SJ
Jan Horbaly, Clerk

Dated February 5, 2010

Issued as a Mandate: March 29, 2010

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Court No. 2009-1113
Decided: February 5, 2010

TOTES-ISOTONER CORPORATION,

Plaintiff-Appellant,

—v.—

UNITED STATES,

Defendant-Appellee.

JOHN M. PETERSON, NEVILLE PETERSON, LLP of New York, New York, *argued for plaintiff-appellant.* With him on the brief were MICHAEL T. CONE, MARIA E. CELIS, and MATTHEW G. SHAW.

JEANNE E. DAVIDSON, *Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee.* With her on the brief were TONY WEST, *Assistant Attorney General,* REGINALD T. BLADES, JR., *Assistant Director,* and AIMEE LEE and DAVID S. SILVERBRAND, *Trial Attorneys.* Of counsel on the brief were KAREN P. BINDER, *Assistant Chief Counsel,* and YELENA

SLEPAK, *Attorney, United States Customs and Border Protection, of New York, New York,* and ELIZABETH BALTZAN, *Office of the General Counsel, United States Trade Representative, of Washington, DC.*

CURTIS W. KNAUSS, GRUNFELD, DESIDERIO, LEBOWITZ, SILVERMAN & KLESTADT LLP, of New York, New York, *for amicus curiae Wolff Shoe.*

Before LOURIE, DYK, and PROST, *Circuit Judges.* Opinion for the court filed by Circuit Judge DYK. Opinion concurring in the result filed by *Circuit Judge* PROST.

OPINION BY: DYK

DYK, *Circuit Judge.*

Totes-Isotoner Corporation ("Totes") appeals from a judgment of the United States Court of International Trade dismissing its complaint against the United States for failure to state a claim. Totes alleged that the Harmonized Tariff Schedule of the United States ("HTSUS") unconstitutionally denies the equal protection of the laws by imposing different rates of duty on seamed leather gloves "for men" and seamed leather gloves "for other persons." *See Totes-Isotoner Corp. v. United States*, 569 F. Supp. 2d 1315, 1319 (Ct. Int'l Trade 2008) ("*Totes I*"). We affirm.

BACKGROUND

Totes is a United States importer of men's seamed leather gloves. As an importer of goods, Totes is required to pay import tariffs as set forth in the HTSUS. Subheading 4203.29.30 of the HTSUS classifies "[m]en's" leather gloves and provides for a duty rate of 14 percent *ad valorem*, whereas gloves "[f]or other persons" are classified under 4204.29.40 and 4203.29.50, HTSUS, which provide for a duty rate of 12.6 percent *ad valorem*. The relevant portions of the HTSUS are set forth below:

> 4203 Articles of apparel and clothing accessories, of leather or of composition leather:
>
> . . .
>
> Gloves, mittens and mitts:
>
> . . .
>
> 4203.29 Other [than those for sports]:
>
> . . .
>
> Other [than horsehide or cowhide (except calfskin) leather]:
>
> . . .
>
> [Seamed]:
>
> 4203.29.30 Men's 14%
>
> 10 Not lined . . . . doz. prs.
>
> 20 Lined. . . . doz. prs.

For other persons:

4203.29.40 00 Not lined .... doz. prs 12.6%

4203.29.50 00 Lined .... doz. prs 12.6

Totes filed a complaint with the Court of International Trade, which has "exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for ... revenue from imports or tonnage." *See* 28 U.S.C. § 1581(i)(1). In its complaint, Totes alleged that by imposing different tariff rates for "[m]en's" gloves and "other" gloves, the HTSUS "unlawfully and unconstitutionally discriminate[s] on the basis of gender or age." *See* Complaint at 1, *Totes I*, 569 F.Supp.2d 1315 (No. 07-00001). Totes sought a refund of duties "unconstitutionally exacted in liquidation under HTSUS Subheading 4203.29.30." *Id.* at 7.

The government filed a motion to dismiss on various grounds. In a decision dated July 3, 2008, the Court of International Trade concluded that Totes' equal protection claims were justiciable and that Totes had standing to bring its claims. *See Totes I*, 569 F. Supp. 2d at 1319. Nonetheless, the court dismissed Totes' complaint for failure to plead facts sufficient to state a claim of unconstitutional discrimination. The dismissal was without prejudice as to the filing of an amended complaint. *Id.* Both Totes and the government sought reconsideration. On reconsideration, the government also argued that the court lacked jurisdiction because Totes failed to exhaust its

administrative remedies, having failed to invoke the Court of International Trade's jurisdiction under 28 U.S.C. § 1581(a) by filing a protest with the United States Customs Service ("Customs"). On November 4, 2008, the court denied both parties' motions for rehearing. *See Totes-Isotoner Corp. v. United States*, 580 F. Supp. 2d 1371, 1374 (Ct. Int'l Trade 2008) ("*Totes II*"). Totes chose not to amend its complaint, and the court accordingly dismissed the complaint with prejudice. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

DISCUSSION

I. Jurisdiction and Related Questions

The government argues that the Court of International Trade did not have jurisdiction to entertain this action, that Totes lacks standing, and that this controversy is non-justiciable. These are questions of law which we review de novo. *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1326 (Fed. Cir. 2006).

A. Jurisdiction Under 28 U.S.C. § 1581(i)

In arguing that the Court of International Trade lacked jurisdiction under 28 U.S.C. § 1581(i), the government points out that jurisdiction under section 1581(i) is not available if jurisdiction is available under other subsections of 1581, and argues that section 1581(a) would have been available if Totes had filed a protest.[1] We disagree. It is 28

[1] Under 28 U.S.C. § 1581(i),

> the Court of International Trade shall have exclusive jurisdiction of any civil action com-

U.S.C. § 1581(i), the residual jurisdiction provision, and not 28 U.S.C. § 1581(a) that provides the jurisdictional mechanism for a challenge to the constitutionality of a tariff. In *Thomson Consumer Electronics, Inc. v. United States*, 247 F.3d 1210, 1215 (Fed. Cir. 2001), we held that filing a protest with Customs under section 1514(a), which is a prerequisite to jurisdiction under section 1581(a), was not required where a plaintiff challenged the constitutionality of a tariff pursuant to section 1581(i). This was so because section 1581(a) did not provide a remedy. We reasoned that there is no protest remedy available to one challenging an unconstitutional statute because Customs lacks the power to declare a statute unconstitutional. *See id.; see also Orleans Int'l, Inc. v. United States*, 334 F.3d 1375, 1380 (Fed. Cir. 2003); *U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1569-71 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360, 118 S. Ct. 1290, 140 L. Ed. 2d 453 (1998).

However, the government relies on *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 128 S. Ct. 1511, 170 L. Ed. 2d 392 (2008), and suggests that *Clintwood* has effectively overruled *Thomson*. In *Clintwood*, a taxpayer claimed that

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menced against the United States . . . that arises out of any law of the United States providing for . . . revenue from imports or tonnage . . . [and their] administration and enforcement . . . .

28 U.S.C. § 1581(a) provides that

> [t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

the government had unlawfully imposed a tax on exports and sought a refund. 128 S. Ct. at 1515. The taxpayer had not, however, filed a claim for refund with the IRS and the statute, 26 U.S.C. § 7422, provided that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with [the IRS]." *See Clintwood,* 128 S. Ct. at 1516. In holding that the statute required initial resort to the IRS, the Supreme Court did not address whether the IRS could in fact provide a refund by declaring the tax unconstitutional. The Court held that exhaustion was required in all circumstances. But the language of the exhaustion provision in *Clintwood*, as the Supreme Court noted, was "unusually emphatic." *Id.* ("Five 'any's' in one sentence and it begins to seem that Congress meant the statute to have expansive reach."). There is no similar provision here unequivocally requiring resort to the protest procedures and section 1581(a). We conclude that *Clintwood* does not alter our holding in *Thomson*, and that the Court of International Trade properly exercised jurisdiction under section 1581(i).

B. Standing

The government also argues that Totes lacks standing to maintain this action. Totes must demonstrate that its claim meets Article III of the Constitution's "case or controversy" requirements. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). To establish Article III standing, Totes must

demonstrate (1) that it has suffered an injury-in-fact; (2) that there is a causal connection between the government's conduct and its injury-in-fact; and (3) that its injury is redressable by the court. *See id.* Totes alleges that it has suffered an injury-in-fact—the payment of customs duties at the 14 percent rate. Totes also alleges that this injury is caused by the government's allegedly discriminatory tariff rates, and seeks refund of any excess duty paid. These allegations typically would satisfy constitutional standing requirements. *See, e.g., U.S. Shoe*, 523 U.S. at 365-66, 370.

The government argues that since all importers of "[m]en's" gloves, including Totes, pay the same tariff rate, there is no discriminatory treatment and that Totes has suffered no injury-in-fact. This argument is frivolous. Equal protection requirements still apply even though everyone in the targeted group is targeted equally. *See Loving v. Virginia*, 388 U.S. 1, 9, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) ("[E]qual application [of Virginia's miscegenation statute] does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.").

The government also argues that if there is any discrimination, it is against the purchasers of gloves, and not the importers of gloves. However, the Supreme Court has held that a vendor may indeed be the proper plaintiff where the vendor itself is injured by the alleged discrimination, even though the vendor is not the object of the discrimination.

In *Craig v. Boren*, the Supreme Court held that a beer vendor had third-party standing to pursue the equal protection claims of 18-20-year-old males against an allegedly discriminatory statute that permitted purchases of 3.2% beer by 18-20-year-old females but denied 18-20-year-old males that same right. 429 U.S. 190, 194-97, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976). The Court noted that "[t]he operation of [the statutes at issue] plainly has inflicted 'injury in fact' upon appellant sufficient to . . . satisfy the constitutionally based standing requirements imposed by Art. III." *Id.* at 194. Here, the importer, like the "vendor [in *Craig*, is] the obvious claimant." *See id. at 197.* A third party, such as Totes, can claim *jus tertii* standing only when (1) the *jus tertii* plaintiff and the party whose rights it is asserting have a close relationship; (2) the *jus tertii* plaintiff has suffered an injury in fact; and (3) there is some hindrance to the first party filing its own claim. *Powers v. Ohio*, 499 U.S. 400, 410-11, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). Here, those requirements are satisfied. There is a close relationship between importers and purchasers. Importers suffer an injury in fact as they are legally required to pay the allegedly discriminatory tariff. The purchasers have no remedy to challenge the tariff classification.[2]

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[2] Totes has stated that it did not and does not currently seek derivative or third-party standing on behalf of adult male purchasers of gloves. *See, e.g., Totes I*, 569 F. Supp. 2d at 1324 n.10. However, in our view, Totes' standing is by its nature, derivative, and this Court evaluates it as such.

In addition to Article III standing requirements, Totes must also meet prudential standing requirements. To satisfy prudential standing requirements, the interests of the affected parties must also arguably be within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1986). The interests of the purchasers of gloves in being free from unconstitutional sex discrimination are plainly within the zone of interests to be protected by the Equal Protection Clause. Therefore, we conclude that Totes has standing to pursue its equal protection claims.

C. Political Question Doctrine

Finally, the government argues that Totes' complaint raises a non-justiciable political question. The political question doctrine excludes certain disputes from judicial determination where the subject matter of the dispute is exclusively assigned to the political branches or where such branches are better-suited than the judicial branch to resolve the matter. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986); *Baker v. Carr*, 369 U.S. 186, 210-11, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). The government argues that the subject matter of Totes' complaint—the constitutionality of the use of gender in tariff classifications—is not appropriate for judicial resolution because the formation and adoption of tariff provisions involve the negotiation of agreements with foreign governments and that there are no judicially manageable standards for reviewing the

results of such international trade agreements. In other words, in the government's view, "[t]he changes in the tariff rates that Totes requests the courts to impose would intrude upon the foreign affairs powers of the political branches by undermining both the specific bargain the President struck and the grounds upon which Congress approved the overall [trade] agreement." Def.-Appellee's Br. 14. We disagree.

As the Court of International Trade noted, though the challenged provisions of the HTSUS originated in international negotiations, they have since been enacted by Congress as statutes comprising the HTSUS.[3] The Supreme Court remarked in *Japan Whaling* that despite the political question doctrine, "the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts." 478 U.S. at 230. The same is true about rulings on the constitutionality of statutes based on the application of the Fifth Amendment's equal protection requirement.

None of the cases cited by the government remotely holds or even implies that the federal courts are barred by the political question doctrine from reviewing federal statutes for compliance with equal protection guarantees. To the extent

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[3] The specific provisions of the HTSUS constitute statutes enacted by Congress pursuant to section 1204(c) of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1204(c), 102 Stat. 1107, 1149 (codified at 19 U.S.C. § 3004(c)).

that the cases address the ability of courts to review federal statutes for compliance with established constitutional standards, they recognize the authority and duty of the federal courts to conduct that review. For example, in *Made in the USA Foundation v. United States*, 242 F.3d 1300 (11th Cir. 2001), the Eleventh Circuit specifically recognized that, even with respect to international agreements,

> 'foreign commitments' cannot relieve the government of the obligation to 'operate within the bounds laid down by the Constitution,' and that 'the prohibitions of the Constitution . . . cannot be nullified by the Executive or by the Executive and Senate combined.' *Reid v. Covert*, 354 U.S. 1, 14, 17, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957). We therefore have little doubt that courts have the authority—indeed, the duty—to invalidate international agreements which violate the express terms of the Constitution.

Id. at 1314.

Therefore, we agree with the Court of International Trade that the political question doctrine is inapplicable. The review of statutory provisions, such as the HTSUS, using constitutional standards, is properly within the realm of the judiciary. "[W]e cannot shirk this responsibility merely because our decision may have significant political overtones." *Japan Whaling*, 478 U.S. at 229-30.

II. Failure to State a Claim

We now turn to the merits. We review the Court of International Trade's decision dismissing the complaint de novo. *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009).

Totes' complaint alleges that the government has assessed, and Totes has paid, customs duties at a rate of 14 percent *ad valorem* on its men's seamed leather gloves. Totes seeks a refund of these customs duties because the provisions of the HTSUS requiring payment of these duties "unlawfully and unconstitutionally discriminate on the basis or gender or age." Complaint at 1, *Totes I*, 569 F.Supp.2d 1315 (No. 07-00001). The Court of International Trade found that Totes' complaint failed to state a claim. We agree, but for somewhat different reasons than those articulated by the Court of International Trade.

Before addressing Totes' primary argument on appeal, it is necessary to clear away the underbrush created by two bad arguments—one made by each side in this case. The government argues that Totes cannot allege a constitutional claim because it "is not entitled to a particular [tariff] classification or rate of duty or preference." Def.-Appellee's Br. 32 (citing *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 318, 53 S. Ct. 350, 77 L. Ed. 796, Treas. Dec. 46331 (1933); *N. Am. Foreign Trading Corp. v. United States*, 783 F.2d 1031, 1032 (Fed. Cir. 1986)). But that hardly precludes a claim of unconstitutional discrimination. Totes is not "effectively claiming entitlement to a specific classification and rate of

duty." *See id.* Totes is complaining about unequal treatment.[4]

Totes argues that the tariff classification is unconstitutional because it discriminates between similar property—men's gloves and women's gloves. While the Supreme Court in *Allegheny Coal* and other cases has held that taxation of property cannot discriminate between items of property of the "same class," allegations of such discrimination are judged under the rational basis test. *See Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336, 341-44, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989); *Charleston Fed. Sav. & Loan Ass'n v. Alderson*, 324 U.S. 182, 190-92, 65 S. Ct. 624, 89 L. Ed. 857 (1945). The rational basis test is relatively easy to satisfy, and Totes has failed to allege facts sufficient to show that men's and women's gloves are property of the same class. Men's and women's gloves are separate commodities, moving in different channels of trade and presenting different commercial issues with respect to domestic manufacturers.[5]

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[4] The government also appears to suggest that Totes has no right to a refund because the government here could have raised the tariff rate on the gloves for "other persons." The Supreme Court has rejected this as a basis for denying judicial relief. *See, e.g., McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.*, 496 U.S. 18, 35-36, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990).

[5] The government observes that historically, "[t]he record particularly reflects sourcing differences; domestic production of men's gloves was higher than for women's gloves, and women's gloves tended to be imported. *See* Dictionary of Tariff Information, Government Printing Office

We turn then to Totes' primary argument—that the tariff provisions at issue unconstitutionally discriminate based on the sex of users of gloves. To properly state a claim for unequal treatment, as with any other claim, a plaintiff must provide "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)); *see Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009).

> While a complaint . . . does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level . . . . . .[S]uch a claim requires a complaint with enough factual matter (taken as true) to suggest that [a claim is plausible].

Bell Atl., 550 U.S. at 555-56 (citations and footnote omitted).

Applying *Bell Atlantic's* pleading requirement to Totes' equal protection claim, the Court of International Trade held that the provisions at issue

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379 (1924); Summary of Tariff Information, Government Printing Office, 2058 (1929)." Def.-Appellee's Br. 59.

were not facially discriminatory, and therefore, Totes' complaint "must include a factual allegation that demonstrates a governmental purpose to discriminate." *Totes I*, 569 F. Supp. 2d at 1326, 1328. The court reasoned that Totes "must at least include an allegation that the challenged tariff classifications distribute the burdens of the tax rate imposed in a way that disadvantages one sex as a whole, or has a disproportionate impact based on sex." *Id.* at 1328.

It may be, as the Court of International Trade suggested, that the tariff does not discriminate between male and female purchasers of gloves because women buy men's gloves for men and men buy women's gloves for women. But this comparison entirely misses the point. The claimed discrimination is based on the sex of the glove users, not the sex of the glove purchasers. There is no serious dispute that men's gloves are typically purchased for use by men, and women's gloves, for women. Indeed the government admits that "the subheadings at issue require Customs to differentiate between gloves because they are targeted for use by specific genders." Def.-Appellee's Br. 63 (quotation mark omitted). Under the theory of purchaser equality, generally imposing a higher tax on vehicles purchased for female users would raise no constitutional questions if both men and women equally purchased the vehicles in question. Any such theory is untenable. For example, in *Califano v. Westcott*, the Supreme Court rejected the government's argument that unlawful sex discrimination did not exist because the benefits law did not distinguish between male and female benefits recipients even though the calculation of the

benefits was affected by sex-based criteria. 443 U.S. 76, 83-84, 99 S. Ct. 2655, 61 L. Ed. 2d 382 (1979). So here, the claimed absence of differential treatment of male and female glove purchasers does not eliminate constitutional concerns concerning sex discrimination. We must accordingly address whether the allegation of disparate impact of the tariff provisions with respect to male glove users is sufficient to create a prima facie case of sex discrimination.[6]

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[6] The concurrence suggests that this disparate impact claim is not raised, stating that "Totes's brief to this court focuses entirely on whether the tariff classification is facially discriminatory." Concurring Op. at 2. While the concurrence is correct that Totes primarily argues that the use provisions are facially discriminatory, at places in its brief Totes argues discriminatory "impact." *See* Pl.-Appellant's Br. 27 (noting that the HTSUS "causes disparate impact based on gender").

In any event, the label that Totes has chosen to describe its claim is not determinative. With respect to pleadings, it is understood that a court looks to "the quality of its substance rather than according to its form or label." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1286 (3d ed. 2004). The same approach applies to briefs. *See, e.g.*, *Goeke v. Branch*, 514 U.S. 115, 118, 115 S. Ct. 1275, 131 L. Ed. 2d 152 (1995) (brief adequately raised issue because it provided the "court with ample opportunity to make a reasoned judgment on the issue"); *see also Smith v. Texas*, 550 U.S. 297, 314, 127 S. Ct. 1686, 167 L. Ed. 2d 632 (2007) ("Smith's labeling of the claim in his supplemental brief, however, did not change its substance.").

The substance of Totes' argument is that the tariff discriminates against male glove users both in theory and in fact and that the occasional use of men's or women's gloves by the other sex (what Totes calls "fugitive" use) does not save the discrimination. *See* Pl.-Appellant's Br. 13 ("[A]

It is well established that disparate impact standing alone does not establish a violation of equal protection. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), the Supreme Court reaffirmed that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.'" *Id.* at 264-65 (quoting *Washington v. Davis*, 426 U.S. 229, 242, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)). Similarly, as we noted in *Yant v. United States*, 588 F.3d 1369, 1373-74 (Fed. Cir. 2009), "[m]ere reliance on gender ratios of two groups [to show disparate impact] does not establish discrimination based on sex." To be sure, the Supreme Court has noted that disparate impact, while not inherently unlawful, supports a finding of purposeful discrimination. *See, e.g., Washington*, 426 U.S. at 242 ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."). In contexts such as jury selection, employment, or fair housing, an allegation of disparate impact may in fact be suffi-

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higher duty on gloves imported for men is a discriminatory duty on men for the purposes of equal protection."), 51 ("Even if this Court were to hold that a gender discrimination claim must assert distinctions among people, the tariff provisions at issue do create distinctions among people for purposes of equal protection analysis. . . . [A] higher duty on gloves imported for men is a discriminatory duty on men for purposes of equal protection.").

cient to make out a prima facie case of discrimination. *See Batson v. Kentucky*, 476 U.S. 79, 96-97, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *Arlington Heights*, 429 U.S. at 266; *Washington*, 426 U.S. at 241-42. However, we think a different approach is required in the tariff context.

This is so for two reasons. First, apart from a desire to raise revenue, Congress, in classifying goods for the imposition of tariffs, as a general matter is not concerned with the characteristics of the ultimate retail users of goods, but rather such classifications are designed to promote particular trade policy objectives negotiated with other countries. The current tariff classification system, the HTSUS, which has been in effect since January 1, 1989, is the result of the United States' implementation of a standardized international product nomenclature system based upon the international Harmonized Commodity Description and Coding System ("HS"). *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 1201-17, 102 Stat. 1107. 1147-63 (codified at 19 U.S.C. § 3001 *et seq.*; Generalized System of Preferences (GSP); *Publication of the Proposed Conversion of the GSP Program to the Harmonized System Tariff Nomenclature*, 51 Fed. Reg. 44,163 (Dec. 8, 1986). The HS, which is administered by the World Customs Organization, and was the result of a ten-year international effort, was developed in order to provide a single modern structure for product classification to be used on an international basis in the classification, description, and coding of goods for customs purposes; for the collection of statistical data on imports and exports; and also for the uniform documentation of

transactions in international trade. *See* U.S. Int'l Trade Comm'n, *Conversion of the Tariff Schedules of the United States Annotated into the Nomenclature Structure of the Harmonized System: Report on Investigation No. 332-131 Under Section 332 of the Tariff Act of 1930*, at 15 ("*Conversion Report*"). The HS is a detailed system, providing for thousands of different tariff classifications, and contains many subdivisions created in order to reflect changes in technology, trade patterns, and user requirements. *Id.* The adoption by the United States of such a comprehensive classification system was the result of extensive multilateral international negotiations and considerable domestic study and comment. *See* 19 U.S.C. § 3001 *et seq.* *See generally Conversion Report*. The rates of duty applicable to different product classifications are the result of multilateral international trade negotiations and reflect reciprocal trade concessions and particularized trade preferences.[7] The reasons behind different duty rates vary widely based on country of origin, the type of product, the circumstances under which the product is imported, and the state of the domestic manufacturing industry. Under such circumstances it is quite possible, even likely, that the different tariff rates for men's and other gloves reflect the fact that such gloves are in fact

[7] *See* Def.-Appellee's Br. 24 ("The challenged rates reflected in the HTSUS are the result of a complex series of multilateral negotiations with the GATT participants. In prepping for the negotiations, the President . . . developed the United States negotiating positions through input from a wide variety of governmental, public, and private sources . . . .").

different products, manufactured by different entities in different countries with differing impacts on domestic industry. Further, differential rates may be the result of trade concessions made by the United States in return for unrelated trade advantages.[8] Absent a showing that Congress intended to discriminate against men in the tariff schedule, we cannot simply assume the existence of such an unusual purpose from the mere fact of disparate impact.

Second, even if we were to regard the HTSUS schedule as simply designed to raise revenue, we again cannot assume that this differential treatment of different goods is invidious. It is well established that the federal government and the states have broad leeway in establishing classifications for purposes of taxation. The Supreme Court has long held that "[i]nherent in the power to tax is the power to discriminate in taxation. 'Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.'" *Leathers v. Medlock*, 499 U.S. 439, 451, 111 S. Ct. 1438, 113 L. Ed. 2d 494 (1991) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983)) (citing *Madden v. Kentucky*, 309 U.S. 83, 87-88, 60 S. Ct. 406, 84 L. Ed. 590 (1940); *N.Y. Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578, 58 S. Ct. 721, 82 L. Ed. 1024 (1938); *Magoun v. Ill. Trust & Sav. Bank*, 170 U.S. 283,

[8] Congress and the President collaborated in the Uruguay Round to negotiate tariff commitments with well over one hundred other "contracting parties" under the General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 61 Stat, A5, 55 U.N.T.S. 187.

294, 18 S. Ct. 594, 42 L. Ed. 1037 (1898)). The same is necessarily true with respect to the closely-related area of customs duties.[9]

Thus, although disparate impact can be relevant to the determination of a purpose to discriminate, we think that in the area of taxation and tariffs, something more than disparate impact is required to establish a purpose to discriminate for the purposes of pleading an equal protection violation. As the Supreme Court noted in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 41, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), "[n]o scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact." A contrary ruling would call into question all taxes on items which are disproportionately consumed by any identifiable group. We note that the Supreme Court even in the First Amendment context has held that distinctions in taxation between media (newspapers and cable systems) are in and of themselves insufficient to establish a purpose to discriminate between the two based on content. *Leathers*, 499 U.S. at 453. So here the mere existence of disparate impact does not establish impermissible

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[9] *See Bd. of Trs. of Univ. of Ill. v. United States*, 289 U.S. 48, 57, 53 S. Ct. 509, 77 L. Ed. 1025, Treas. Dec. 46306 (1933) ("The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted. No one can be said to have a vested right to carry on foreign commerce with the United States. If the Congress saw fit to lay an embargo or to prohibit altogether the importation of specified articles, . . . the Congress may . . ." (citations omitted)).

discrimination. In the area of customs duties, even more than in the area of taxation, it is hazardous to infer discriminatory purpose from discriminatory impact.

Totes cites *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993), for the proposition that "an intent to disfavor a certain class can be inferred if taxes target objects favored by a particular class of people." Pl.-Appellant's Br. 51. *Bray*, however, offers no support for Totes' position. In *Bray*, the Supreme Court, in discussing whether the goal of preventing abortion qualifies as an invidiously discriminatory animus directed at women in general, remarked that "[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews." 506 U.S. at 270. Men's gloves are hardly an irrational object of disfavor, and a tax on them creates no compelling inference that Congress intended to discriminate against men.

For the above reasons, we hold that because the challenged provisions of the HTSUS are not facially discriminatory, Totes is required to allege facts sufficient to establish a governmental purpose to discriminate between male and female users. Here, an allegation of mere disparate impact is not sufficient to satisfy this pleading requirement. Because Totes does not meet its burden to allege facts sufficient to infer a governmental purpose to discriminate, we hold that Totes' complaint fails to state an equal protection

claim. The same necessarily is true with respect to Totes' allegation of discrimination based on age, which is subject only to rational basis review.

CONCLUSION

We affirm the Court of International Trade's judgment concluding that it had jurisdiction under section 1581(i), that Totes has standing to bring its claims, and that Totes' equal protection claims are justiciable. We also affirm its judgment that Totes has failed to state an equal protection claim due to its failure to plead facts sufficient to allege a claim of unconstitutional discrimination.

AFFIRMED

COSTS

No costs.

CONCUR BY: PROST

CONCUR

PROST, *Circuit Judge*, concurring in the result.

While I concur with the result in this case, I do not accept the majority's treatment of trade law as an exception to this country's equal protection jurisprudence and implication that a heightened legal standard applies only in the context of tariff schedules. I find the majority's position on this issue particularly difficult because it was never

advocated by the Government, and is not responsive to Totes-Isotoner Corporation's ("Totes's") arguments on appeal. The present case can be readily dismissed under current Supreme Court precedent because the disputed tariff classification is not facially discriminatory.

Totes's complaint states, "the rate of duty imposed on seamed leather gloves imported for men is higher than the rate of seamed leather gloves imported for women, and there is no exceedingly persuasive justification for this discrimination. Defendant has thereby discriminated against [Totes] . . . ." A similar allegation is made for age discrimination based on the distinction between men's and children's gloves.

The case, in my view, is properly dismissed under current controlling equal protection and pleading law. The fact that the tariff scheme is designed to protect domestic industry and harmonize international markets is not a reason to create an exception to discrimination law, but rather, it provides the very persuasive justification under the law that Totes alleges is lacking. The Government's brief correctly characterizes the objectives of tariff laws as justifying the disputed classification, rather than necessitating an exception to traditional equal protection analysis.

Stating an equal protection claim requires alleging either (a) that a law is facially discriminatory against natural persons, or (b) that the law has a disparate impact on natural persons resulting from a discriminatory purpose. *Raytheon v. Hernandez*, 540 U.S. 44, 52-53, 124 S. Ct. 513, 157 L. Ed. 2d 357 (2003); *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264-65,

97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). Although the majority opinion focuses on dismissing a claim of disparate impact, Totes's brief to this court focuses entirely on whether the tariff classification is facially discriminatory.

The majority opinion declares that imposing the disputed tariff results in a disparate impact on adult male glove wearers. The opinion then goes on to hold that in the unique context of tariff law, showing disparate impact is never enough, and the complainant must allege additional facts demonstrating a discriminatory purpose. Such a position is unnecessary, however, because Totes does not argue on appeal that the tariff results in a disparate impact, and the complaint does not allege any disparate impact.[1]

In my view, the more straightforward answer to Totes's arguments on appeal is that the tariff classification here is not facially discriminatory. It imposes a burden on importers, not gender- or age-based classes of people.[2] It distinguishes on

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[1] The majority's analysis with respect to standing is similarly flawed. The majority finds that Totes has standing as a third party on behalf of the men against whom the tariff discriminates. Totes did not allege, however, that the male consumers for whom its gloves were imported are the target of discrimination. Totes alleges that the Government has discriminated against Totes. Totes identifies the harm caused as the higher tariff rate for Totes, and not any harm that may or may not be passed on to consumers. Totes's complaint thus does not state a claim for which third party standing is necessary or appropriate.

[2] Totes cites *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993), for the proposition that whether a statute is facially

the basis of products, not natural people. *Cf. Berkley v. United States*, 287 F.3d 1076, 1084 (Fed. Cir. 2002) (holding that a law is facially discriminatory if it classifies persons for unequal treatment on the basis of race or gender). The fact that the products are designed for use by men rather than women and children does not constitute disparate treatment of actual men. Much like tuxedos and evening gowns are different products, men's and women's gloves are different products. The happenstance that the English language does not have separate names for these particular products, thus requiring reference to the gender of the intended wearer, does not transform the distinction into facial discrimination.

Bridging the analytical gap between classifying clothing by reference to the gender or age of the intended wearer and engaging in prohibited discrimination thus requires factual allegations sufficient to establish that imposition of the tariff results in a greater burden to one gender or age group over another. Such allegations would speak to the disparate impact test, rather than the facially discriminatory test.[3]

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discriminatory turns on the object or purpose of the statute. *Lukumi*, however, actually cuts against Totes's position. Totes failed to allege a discriminatory purpose of the tariff classification. Here, the undisputed object of the statute is to protect domestic industry and harmonize international markets, rather than to infringe upon or restrict men's access to gloves.

[3] Any claim of disparate impact in the present case, however, would also fail under the Supreme Court's test in *Arlington Heights*, because Totes has not alleged sufficient facts to connect any disparate impact to a discriminatory

Totes's complaint alleges discrimination against Totes, not against men. The complaint makes no connection between the impact of the tariff on importers and the impact on consumers. Totes does not allege, for example, that the tariff results in men paying higher prices for gloves, having a more limited selection of colors and styles of gloves, or having a more limited selection of merchants for gloves than women and children. In fact, Totes confirmed at oral argument before this court that it does not allege that the cost of the higher tariff is passed on to consumers. *See* Oral Argument available at *http://oralarguments.cafc.uscourts.gov/mp3/2009-1113.mp3*.

Because the tariff classification is not facially discriminatory and Totes has not alleged a disparate impact, Totes has failed to state an equal protection claim on which relief can be granted. I would resolve this case on that basis, rather than on the novel disparate impact analysis of the majority, and thus concur only in the result.

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purpose underlying the classification. This case thus provides no reason to treat tax and tariff law any differently than any other area of law for purposes of inferring discriminatory purpose from a showing of disparate impact.

UNITED STATES COURT
OF INTERNATIONAL TRADE

Court No. 07-00001
Decided: November 4, 2008

TOTES-ISOTONER CORPORATION,

Plaintiff,

—v.—

UNITED STATES,

Defendant.

NEVILLE PETERSON, LLP (JOHN M. PETERSON, MARIA E. CELIS, MATTHEW G. SHAW, and MICHAEL T. CONE) *for the Plaintiff.*

GREGORY G. KATSAS, *Acting Assistant Attorney General;* JEANNE E. DAVIDSON, *Director,* PATRICIA M. MCCARTHY, *Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice* (REGINALD T. BLADES, JR.); AIMEE LEE and GARDNER B. MILLER, *Attorneys, International Trade Field Office, U.S. Department of Justice, for the Defendant.*

BEFORE: THE HONORABLE JANE A. RESTANI, *Chief Judge*, THE HONORABLE DONALD C. POGUE, *Judge*, THE HONORABLE JUDITH M. BARZILAY, *Judge*.

OPINION BY: DONALD C. POGUE

OPINION

MEMORANDUM AND ORDER

Pogue, Judge: Totes-Isotoner Corporation ("Totes") alleged in its complaint in this action that the Harmonized Tariff Schedule of the United States ("HTSUS") illegally discriminates on the basis of gender and/or age by setting out different tariff rates for certain "Men's" gloves as opposed to "other" gloves. The court dismissed Totes's complaint in *Totes-Isotoner Corp. v. United States*, CIT, 569 F. Supp. 2d 1315 (2008) (holding that Totes had standing to bring, and the court had jurisdiction to hear, Totes's claim, but dismissing for failure to state a claim because the complaint, as pled, did not "show" or allege facts sufficient to ground an inference of discrimination) (hereinafter "the court's July 3 opinion").[1]

Both parties seek reconsideration of the court's July 3 opinion pursuant to USCIT R. 59.[2] Defen-

[1] Familiarity with the court's July 3 opinion is presumed.

[2] USCIT Rule 59 provides that a "rehearing may be granted . . . for any of the reasons for which rehearings have

dant United States again asks that the court dismiss the matter for lack of jurisdiction, rather than for failure to state a claim. The government alleges that Totes, prior to instituting its action, failed to exhaust its administrative remedies when it failed to file a protest with the United States Customs Service[3] ("Customs") as necessary to invoke the Court's jurisdiction under 28 U.S.C. § 1581(a). At the same time, Totes seeks reconsideration of the court's holding that its complaint failed to state a claim. Citing *Berkley v. United States*, 287 F.3d 1076 (Fed. Cir. 2002), Totes alleges that the challenged tariff provision is facially discriminatory, and thus the court should infer or presume the government's discriminatory intent. Alternatively, Totes asks the court to certify for interlocutory appeal the question of whether the tariff provision at issue is facially discriminatory.

Because neither motion identifies legal error in the court's July 3 opinion, as explained below, the court denies both motions.

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heretofore been granted in suits in equity in the courts of the United States."

[3] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. No. 107-296 § 1502, 2002 U.S.C.C.A.N. (116 Stat.) 2135, 2308; Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108-32, at 4 (2003).

— Standard of Review

The court will grant a rehearing "only in limited circumstances, including [where there has been] 1) an error or irregularity, 2) a serious evidentiary flaw, 3) the discovery of new evidence which even a diligent party could not have discovered in time, or 4) an accident, unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case." *Target Stores v. United States*, CIT, 471 F. Supp. 2d 1344, 1347 (2007) (citing *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990)); *Salmon Spawning & Recovery Alliance v. Basham*, Slip Op. 07-69, 2007 Ct. Intl. Trade LEXIS 67, 2007 WL 1362434, at *1 (CIT May 9, 2007), *rev'd in part on other grounds*, 532 F.3d 1338 (Fed. Cir. 2008). The court will not grant such a motion "merely to give a losing party another chance to re-litigate the case or present arguments it previously raised." *Basham*, Slip Op. 07-69, 2007 Ct. Intl. Trade LEXIS 67, at *3, 2007 WL 1362434, at *1.

Both motions, by alleging "error" in the court's July 3 opinion, invoke only the first ground for rehearing. Applying this standard, the court will address each motion in turn.

United States' Motion for Reconsideration

The court begins with the government's motion. Although Totes based its claims on the alleged unconstitutionality of the HTSUS, the government, relying on *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S., 128 S. Ct. 1511,

170 L. Ed. 2d 392 (2008), argues that Totes was required to exhaust its administrative remedies by filing a protest with Customs pursuant to 19 U.S.C. § 1514(a) prior to filing its complaint. The government claims that *Clintwood* dictates that Totes's failure to file such a protest divests the court of jurisdiction, and that, as a result, the court erred in its July 3 opinion by exercising jurisdiction and must instead dismiss Totes's claim for lack of jurisdiction.

Clintwood, however, is a tax case, and thus was controlled by the applicable provisions of the United States Tax Code. *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S., 128 S. Ct. 1511, 1516, 170 L. Ed. 2d 392 (2008). Title 26 U.S.C. § 7422(a), the Tax Code's jurisdictional provision, states that "[no] suit . . . shall be maintained in any court for the recovery . . . of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund . . . has been duly filed with [the Internal Revenue Service ('IRS')]." *Clintwood* held that section 7422(a)'s plain language required the plaintiffs to file a refund claim with the IRS, even though the plaintiff's cause of action was based on a purported constitutional violation. *Clintwood* 128 S. Ct. at 1516 ("Five 'any's' in one sentence and it begins to seem that Congress meant the statute to have expansive reach.").

Although the United States attempts to analogize the Tax Code's section 7422 (a) to this Court's jurisdictional statutes, the statutes are clearly distinguishable. Section 7422(a)'s language explicitly and plainly requires administrative exhaustion in all circumstances. In contrast, the

statutory provisions which the government invokes here *do not* affirmatively deny the Court jurisdiction when a plaintiff, that cannot effectively protest its action under 19 U.S.C. § 1514(a) and 28 U.S.C. § 1581(a), fails to exhaust administrative remedies.

Indeed, neither section 1514(a) nor section 1581(a) prevent Totes from proceeding in this case. To begin with, section 1514(a) only applies to "decisions of the Customs Service." Although section 1514(a) states that Customs' "decisions" regarding the "classification and rate and amount of duties chargeable" are "final," unless a protest is filed in accordance with the provisions of other sections of 19 U.S.C. § 1514, there is no Customs "decision" at issue here. Totes challenges the constitutionality of the provisions of the HTSUS itself, and Customs makes no decision in this respect other than to routinely apply the HTSUS categories to imported goods. *See Forest Labs., Inc. v. United States*, 476 F.3d 877, 883 (Fed. Cir. 2007) (citing *Jewelpak Corp. v. United States*, 20 CIT 1402, 1409-10, 950 F. Supp. 343, 350 (1996), *aff'd*, 297 F.3d 1326 (Fed. Cir. 2002)) ("Customs has no authority to alter or amend the duty rates of the tariff schedule because the duty rates are part of the tariff statute enacted by Congress"); *Mitsubishi Elec. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994) (holding that Customs does not make antidumping "decisions" for section 1514(a) to apply, as Customs simply follows the Department of Commerce's instructions in assessing and collecting certain duties, and thus the court held it lacked section 1581(a) jurisdiction).

This circuit's section 1514(a) case law generally exempts, from otherwise required administrative exhaustion, constitutional challenges to statutory provisions from which Customs has no discretion to deviate. *See, e.g., Thomson Consumer Elecs., Inc. v. United States*, 247 F.3d 1210, 1215 (Fed. Cir. 2001) (holding constitutional challenges to the Harbor Maintenance Tax ("HMT") exempt from administrative exhaustion requirements); *U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1569-71 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360, 118 S. Ct. 1290, 140 L. Ed. 2d 453 (1998) (same). When seeking to challenge a provision over which Customs has no authority or discretion, a plaintiff need not file a protest and then invoke jurisdiction under section 1581(a); such a plaintiff may instead rely upon section 1581(i). *Orleans Int'l, Inc. v. United States*, 334 F.3d 1375, 1380 (Fed. Cir. 2003) (holding that the Court of International Trade had section 1581(i) jurisdiction over Orleans' constitutional challenge of import assessments mandated by the Beef Promotion and Research Act); *Pat Huval Rest. & Oyster Bar, Inc. v. United States*, CIT, 547 F. Supp. 2d 1352, 1362-63 (2008) (per curiam) (constitutional challenge to "Byrd Amendment" allowed under 1581(i)). This follows from the recognition that, in applying a statute over which Customs has no authority or discretion, Customs does not make a "decision" that a plaintiff such as Totes can protest. *See U.S. Shoe*, 114 F.3d at 1569 ("Typically, 'decisions' of Customs are substantive determinations involving the application of pertinent law and precedent to a set of facts, such as tariff classification and applicable rate of duty. Indeed, prior case law

indicates that Customs must engage in some sort of decision-making process in order for there to be a protestable decision."). When there is no Customs "decision" subject to protest, sections 1514(a) and 1581(a) do not apply, and the Court has jurisdiction under section 1581(i).[4] *See id.* at 1569-71.

While 28 U.S.C. § 1581(a) vests the Court with exclusive jurisdiction in "any civil action commenced to contest [Customs'] denial of a protest," at the same time, 28 U.S.C. § 1581(i) vests the Court with "residual jurisdiction." *See Thomson Consumer Elecs.*, 247 F.3d at 1213 (Section 1581(i) is "the court's residual jurisdiction provision"). Generally, the residual jurisdictional provision "may not be invoked when jurisdiction under

[4] 28 U.S.C. § 1581(i) reads: "In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for

> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section. . . ."

another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987); *see also Nufarm America's, Inc. v. United States*, 29 CIT 1317, 1319, 1325, 398 F. Supp. 2d 1338, 1341 (2005). Because there is no protest remedy for an unconstitutional statute, however, section 1581(a) does not provide the jurisdictional mechanism. Where a plaintiff wishes to challenge the tariff provision itself, and section 1581(a) does not apply, the plaintiff can and must invoke section 1581(i) residual jurisdiction to obtain relief in this Court.

Following this statutory scheme, Totes's section 1514(a) protest of Customs' assessments in this case would have been an exercise in futility. Thus, in *Thomson Consumer Electronics*, the Federal Circuit held that jurisdiction under 28 U.S.C. § 1581(a) "was not an appropriate vehicle" for Thomson's constitutional challenge of the HMT, and the only appropriate jurisdictional provision for this constitutional challenge was 28 U.S.C. § 1581(i). *Thomson Consumer Elecs.*, 247 F.3d at 1213. Filing a protest with Customs, a prerequisite to jurisdiction under section 1581(a), "would have been an utter futility" because "collection of the HMT is a purely ministerial task over which Customs exercises no discretion." *Id.* at 1213, 1215 (citing *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 365, 118 S. Ct. 1290, 140 L. Ed. 2d 453 (1998) (noting that Customs, as to its application of the HMT, " 'performs no active role,' [] undertakes 'no analysis [or adjudication],' 'issues no directives,' 'imposes no liabilities'; [and,] instead,

Customs 'merely passively collects' HMT payments")). Hence, the Federal Circuit did not require Thomson to protest, under section 1514(a), the constitutionality of the HMT. Jurisdiction did not lie under 28 U.S.C. § 1581(a), because that provision only provides jurisdiction over a denial of a protest, and residual jurisdiction under 28 U.S.C. § 1581(i) applied. *Id.* at 1215. Here, for Totes to file a protest with Customs would have been similarly futile.

Moreover, given the futility of a protest in a case such as this, general principles of administrative law do not tip the scale in favor of administrative exhaustion. In *Thomson Consumer Electronics*, Federal Circuit noted that "[e]xhaustion requirements ensure that an agency and the interested parties fully develop the facts to aid judicial review." *Id.* at 1214 (citing *McKart v. United States*, 395 U.S. 185, 194, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969) ("judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise.")). The court noted other justifications for requiring exhaustion: practical notions of judicial efficiency, administrative autonomy, and administrative effectiveness. *Id.* However, the court held that it was "unsuitable to apply the exhaustion doctrine," as "[t]here are no facts that Customs could have developed regarding whether or not the HMT was constitutional, nor did it have discretion in applying the HMT to Thomson's imports." *Id.* at 1215. Customs was "powerless to perform any active role in the determination of the constitutionality of the assessment since it cannot rule on the validity of

an Act of Congress." *Id.* Thus, requiring Thomson to exhaust its administrative remedies by filing a protest "would be an insistence of a useless formality and inequitable." *Id.* (citing *U.S. Cane Sugar Refiners' Ass'n v. Block*, 3 CIT 196, 201, 544 F. Supp. 883, 887 (1982)).

Similar principles prevail here because the constitutional issue that Totes raises is not amenable to administrative determination. Totes's complaint raises only a constitutional challenge to the HTSUS. Customs, however, has no authority to make any decision regarding HTSUS constitutionality and can only "simply passively assess [the HTSUS] and collect" the required tariff. *Id.* (citing *U.S. Shoe Corp.*, 523 U.S. at 365); *see Forest Labs., Inc. v. United States*, 476 F.3d 877, 883 (Fed. Cir. 2007). As in *Thomson Consumer Electronics*, Totes can only challenge Subheading 4203.29.30's constitutionality in an action before this Court. Hence, it was not necessary for Totes to protest, under 19 U.S.C. § 1514(a), the constitutionality of HTSUS Subheading 4203.29.30.

Although the government has not specifically articulated its reading of the interaction of the court's jurisdictional statutes in this case, the government appears to re-espouse its previously-held position that has already been rejected by the case law of this circuit. Specifically, the government contends that, because 28 U.S.C. § 1581(a) is the appropriate basis for jurisdiction, Totes cannot enjoy section 1581(i) residual jurisdiction.

As previously mentioned, however, the law of this circuit is to the contrary. Furthermore, with regard to administrative exhaustion, cases for which jurisdiction lies pursuant to section 1581(i)

proceed under a statutory provision, 28 U.S.C. § 2637(d), which is very different from the Tax Code's jurisdictional provision applied in *Clintwood*. Rather, in section 1581(i) cases, while the Court still "shall" require administrative exhaustion, it does so only "where appropriate," as provided by section 2637(d). It hardly could be deemed "appropriate" to require Totes to protest an assessment over which Customs has no discretion.

In essence, the government now attempts to use *Clintwood* to have the court overturn Federal Circuit and its own precedent. We do not read *Clintwood* to require such a result. Accordingly, in its July 3 opinion, the court correctly exercised jurisdiction according to 28 U.S.C. § 1581(i). *Totes-Isotoner Corp. v. United States*, CIT, 569 F. Supp. 2d 1315, 1319 (2008). Therefore, as the government does not identify error in the court's July 3 opinion, its motion must be denied.

Totes's Motion for Reconsideration

Totes's motion is also unpersuasive. Totes insists that the court's July 3 opinion conflicts with the law of this circuit, as the opinion improperly imposed a pleading requirement that Totes "show" gender-based discrimination by demonstrating how the alleged gender-based classification was interpreted or applied. According to Totes, the complaint's pleading of the existence of a gender-based classification suffices to establish an inference of unconstitutional discrimination. However, the court will only excuse the plaintiff's requirement to demonstrate either discriminatory

intent or that the law at issue actually caused unconstitutional discrimination after the plaintiff has shown that the provision is facially discriminatory. *See Berkley v. United States*, 287 F.3d 1076 (Fed. Cir. 2002) ("if the Instruction established a [impermissible] classification on its face, no further evidence or inquiry would be required as to how it may have been interpreted or applied"); *Lutheran Church-Missouri Synod v. Fed. Commc'n Comm'n*, 332 U.S. App. D.C. 165, 154 F.3d 487, 492-93 (D.C. Cir. 1998) ("[o]nce a government program is shown to call for [a classification violative of equal protection], the heavy burden to justify it shifts to the government [and the] challenger does not have to show that the program actually caused [discrimination] in the actual case"). Totes has failed to demonstrate an impermissible classification, and thus cannot expect the court to waive the requirement of a demonstration of discriminatory intent.

Despite this well-established equal protection jurisprudence, Totes argues that the Federal Circuit's *Berkley* decision requires a different result. *See Berkley*, 287 F.3d 1076. *Berkley* involved a military pay class action in which individuals, terminated pursuant to the 1993 Reduction in Force, claimed that the formal instructions governing the selection of those subject to termination violated the equal protection guarantee of the Fifth Amendment. *Id.* at 1081. The challenged instruction mandated a specific process exclusively for the evaluation of female and minority officers:

> Your evaluation of minority and women officers must clearly afford them fair and equitable consideration. Equal opportu-

> nity for all officers is an essential element of our selection system. In your evaluation of the records of minority and women officers, you should be particularly sensitive to the possibility that past individual and societal attitudes, and in some instances utilization of policies or practices, may have placed these officers at a disadvantage from a total career perspective. The Board shall prepare for review by the Secretary and the Chief of Staff, a report of minority and female officer selections as compared to the selection rates for all officers considered by the Board.

Id.

Significantly, the *Berkley* court specifically acknowledged that "[t]o state a claim for an equal protection violation, appellants must allege that a government actor intentionally discriminated against them on the basis of race, national origin or gender." *Id.* at 1084 (quoting *Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999)). The *Berkley* court considered the challenged instruction there to constitute an example of a facially discriminatory law or policy, from which the court could imply discriminatory intent. *Id.* In coming to this conclusion, the court held that the instruction explicitly required different treatment on the basis of ethnicity or sex:

> The Instruction at issue . . . provided explicit orders that when the Board members reviewed the records of minority and women officers, "[they] should be particularly sensitive to the possibility that past

> individual and societal attitudes, and in some instances utilization of policies or practices, may have placed these officers at a disadvantage from a total career perspective."

Id. at 1084-85 (citation omitted). The court concluded that, due to its language, the instruction was facially discriminatory because it "clearly required, on its face, that female and minority officers were to be evaluated under a different standard than white male officers." *Id.* at 1088. In other words, the classification at issue in *Berkley* applied different standards to different officers based on their sex or ethnicity.

The court also found persuasive "the Instruction's dictate of special consideration for minorities and women [which] was immediately followed by the requirement that the Board prepare a report for review by its superiors." *Id.* at 1085. The records of the female and minority officers were to be reviewed with "particular sensitivity" and, while neither formal quotas nor actual numerical goals were set forth in the instruction, persons charged with applying this "sensitivity" were advised that their actions would be reviewed by their superiors. *Id* at 1088. The court thus inferred intentional discrimination in the creation of the classification, and the court did not require the officers to make a threshold showing of how the facially discriminatory provisions were interpreted or applied. *Id. at* 1086-87.

In contrast, the HTSUS is not facially discriminatory; the HTSUS instead merely distinguishes between two similar products based upon the tar-

iff provisions' descriptions of "Men's" or "other" gloves. Unlike the classification at issue in *Berkley*, the tariff schedule does not, for example, explicitly order Customs to collect a lower rate of duty when that duty is to be paid by women. While Subheading 4203.29.30 requires Customs to differentiate between gloves because they are targeted for use by specific genders, this is not sufficient to show facial discrimination. The *Berkley* court held the instruction in that case to be facially discriminatory because the instruction clearly required people to be treated differently on the basis of gender and race. Totes only alleges that Subheading 4203.29.30 distinguishes between products labeled for consumption by different genders. A product's mere classification based on the anticipated principal use of the good does not inherently mandate that the articles actually be so used, making the classification's effect on purchasers of different genders questionable at best. Notably, any importer of such good, whether male or female, pays the same tariff.

Thus, Totes's allegation is insufficient to show discrimination "on the basis of" sex, as its complaint provides an insufficient basis for the court to make an inference of unconstitutional discrimination. Nothing in the Federal Circuit's opinion in *Berkley* requires a different result. Accordingly, the court denies Totes's motion.

Totes's Motion for Certification for Interlocutory Appeal

In the alternative, Totes asks that the court certify the facial discrimination issue for interlocutory appeal to the Federal Circuit pursuant to 28 U.S.C. § 1292(d)(1). However, before the court certifies an issue for interlocutory appeal: (1) there must be a controlling question of law on which there is substantial difference of opinion; and (2) immediate appeal must materially advance the ultimate termination of the litigation. *Volkswagen of Am., Inc. v. United States*, 22 CIT 280, 284, 4 F. Supp. 2d 1259, 1263 (1998). Neither condition is met here.

First, disagreement with the court's grant of a motion to dismiss does not establish a "substantial ground for difference of opinion" as required by 28 U.S.C. § 1292(d) (1). *See First Am. Corp v. Al-Nahyan*, 948 F. Supp. 1107, 1116 (D.D.C. 1996) ("Mere disagreement, even if vehement, with a court's ruling on a motion to dismiss does not establish a 'substantial ground for difference of opinion' sufficient to satisfy the statutory requirements for an interlocutory appeal."). While the precise contours of the pleading standard imposed by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007), and applied in the court's July 3 opinion, may not yet be clear, it *is* clear that Totes's complaint must provide some showing of a purpose or intent to disfavor individuals because of their sex. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993) (pleading requirements to show gender discrimi-

nation "do[ ] demand, however, at least a purpose that focuses upon women *by reason of their sex*" (emphasis in original)). Totes's complaint makes no such showing.

Second, Totes cannot meet the second requirement for an interlocutory appeal, i.e., that such an appeal would materially advance the ultimate termination of the litigation. Here, the court must consider the extent to which an interlocutory appeal will save "time and expense . . . if the order appealed is found to be in error." *United States v. Kingshead Corp.*, 13 CIT 961, 962 (1989). In the case at hand, an interlocutory appeal is unnecessary because the court's July 3 opinion can expeditiously lead to a final judgment. *See Retamal v. U.S. Customs & Border Prot.*, Slip Op. 06-70, 30 Ct. Int'l Trade 648, 2006 Ct. Intl. Trade LEXIS 66, at *1 (CIT 2006) ("Pursuant to this court's slip opinion . . . final judgment was entered, dismissing this action" (citations omitted)), and an interlocutory appeal would neither materially advance the ultimate termination of the litigation nor save time or expense.

The court's July 3 opinion permitted Totes to either amend its complaint or accept judgment of dismissal. If Totes chooses not to amend its pleadings, the litigation is terminated at that point. Totes is then free to appeal to the Federal Circuit on the issues that it asks this Court to certify. On the other hand, if Totes chooses to amend its complaint, the matter can proceed to expeditious determination here.

Thus, as Totes has failed to demonstrate either a "substantial ground for difference of opinion" or that an immediate interlocutory appeal materially

advances the ultimate termination of the litigation, its motion for certification must be denied.

CONCLUSION

Accordingly, because the court finds no error or irregularity in its July 3 opinion, both motions for rehearing and reconsideration are denied. The court's order of August 29, 2008, staying this action, is lifted. In accordance with that order, Totes may have thirty (30) days within which to file an amended complaint. If no amended complaint is filed by December 4, 2008, the matter is DISMISSED with prejudice.

/s/ DONALD C. POGUE
DONALD C. POGUE, *Judge*

Dated: November 4, 2008
New York, New York

UNITED STATES COURT
OF INTERNATIONAL TRADE

Court No. 07-00001
Decided: July 3, 2008

TOTES-ISOTONER CORPORATION,

Plaintiff,

—v.—

UNITED STATES,

Defendant.

NEVILLE PETERSON, LLP (JOHN M. PETERSON, CURTIS W. KNAUSS, MATTHEW G. SHAW, and MICHAEL T. CONE) *for the Plaintiff.*

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BEFORE: THE HONORABLE JANE A. RESTANI, *Chief Judge*, THE HONORABLE DONALD C. POGUE, *Judge*, THE HONORABLE JUDITH M. BARZILAY, *Judge*.

OPINION BY: DONALD C. POGUE

OPINION

Pogue, Judge: In this action, Plaintiff, Totes-Isotoner Corporation ("Totes"), a U.S. importer of men's gloves, challenges the constitutionality of the tariff rate imposed on its imports. Totes claims that by setting out different tariff rates for certain "Men's" gloves and other gloves, the Tariff Schedule violates Totes' right to equal protection under the law because it discriminates on the basis of gender and/or age.

The Defendant United States asks the Court to dismiss Totes' complaint, claiming that the Court does not have jurisdiction over this matter for two reasons: (1) the Complaint presents a non-justiciable political question; and (2) the Plaintiff does not have a sufficient stake in the matter so as to possess standing to bring this equal protection claim. USCIT Rule 12(b)(1). In the alternative, the government also seeks dismissal under USCIT Rule 12(b)(5), asserting that Totes' pleadings fail to state a claim upon which relief can be granted.

Because the Court concludes that Totes' equal protection claims properly invoke the Court's traditional role of—and standards for—constitutional review, and that Totes has standing to bring its

claims, the Court denies Defendant's motion to dismiss for lack of jurisdiction. However, because Plaintiff's Complaint does not plead sufficient facts to state a claim of unconstitutional discrimination, the Court dismisses this matter, without prejudice, pursuant to Rule 12(b)(5).

The Court exercises jurisdiction, pursuant to 28 U.S.C. § 1581(i)(1), which grants to the court exclusive jurisdiction over actions arising out of a law of the United States which provides for "revenue from imports."

Discussion

The Court will discuss, in turn, each of the stated bases for the government's motion to dismiss: 1. The Political Question Doctrine; 2. The Alleged Lack of Constitutional and Prudential Standing; and 3. Totes' Failure to State a Claim.

I. The Political Question Doctrine

In its Complaint, which the government would have us dismiss, Totes pleads that the government classifies "Men's" leather gloves in subheading 4203.2930, of the Harmonized Tariff Schedule of the United States ("HTSUS"),[1] at a duty rate of 14

[1] 4203.2930, HTSUS includes subheadings for both lined and unlined gloves. 4203.29.3010, HTSUS includes "Articles of apparel and clothing accessories, of leather or of composition leather: Gloves, mittens and mitts: Other: Other: Other: Men's . . . . Not lined." 4203.29.3020, HTSUS includes "Articles of apparel and clothing accessories, of leather or of composition leather: Gloves, mittens and mitts: Other: Other: Other: Men's . . . .Lined."

percent ad valorem, whereas gloves "[f]or other persons" are classified under subheading 4203.2940, HTSUS,[2] at the lower duty rate of 12.6 percent ad valorem.[3] Totes alleges that these provisions of the HTSUS "discriminate on the basis of gender or age," Complaint at 1, in violation of the Constitution's Equal Protection guarantee. U.S. CONST. amend. XIV, § 1, cl. 2 ("[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").[4] Accordingly, the

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[2] 4203.2950, HTSUS includes "Articles of apparel and clothing accessories, of leather or of composition leather: Gloves, mittens and mitts: Other: Other: Other: For other persons . . . Lined."

[3] For purposes of the Court's standing determination, the government does not contest the factual allegations in Totes' Complaint.

[4] Although Totes bases its claim on an alleged violation of the Fifth Amendment, which provides that no person shall be deprived of life, liberty, or property, without due process of law, the analysis is the same as that for claims brought under the *equal protection clause of the Fourteenth Amendment*. *Bolling v. Sharpe*, 347 U.S. 497, 500, 74 S. Ct. 693, 98 L. Ed. 884 (1954) ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the *Fifth Amendment to the Constitution*." (footnote omitted)); *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976) ("[T]he *Due Process Clause of the Fifth Amendment* contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." (citation omitted)). Therefore, the Court applies cases relating to the two amendments in its analysis.

Complaint challenges the extent to which the government may use gender in the classification of goods for importation.

Nonetheless, the government argues that this Complaint raises a non-justiciable political question. As noted above, however, in the Court's view, the Complaint seeks review of specific statutory provisions using traditional constitutional equal protection standards that have long been interpreted and applied by the judicial branch. As such, Totes' claim does not intrude into the non-judicial domain.

The political question doctrine, recognizing our constitutional separation of powers principle, does exclude some disputes from judicial determination. Under this doctrine, a subject matter is not appropriate for judicial resolution where it is exclusively assigned to the political branches or where such branches are better-suited than the judicial branch to determine the matter. See *Baker v. Carr*, 369 U.S. 186, 211, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962);[5] *Japan Whaling Ass'n v. Am.*

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[5] Baker identified six characteristics of cases found inappropriate for judicial consideration under the political question doctrine.

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or

Cetacean Soc'y, 478 U.S. 221, 230, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986) ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'" (quoting *United States ex rel. Joseph v. Cannon*, 206 U.S. App. D.C. 405, 642 F.2d 1373, 1379 (1981) (footnote omitted), cert. denied, 455 U.S. 999, 102 S. Ct. 1630, 71 L. Ed. 2d 865 (1982))).

Invoking this doctrine, the government asserts that the subject matter of Plaintiff's Complaint—the use of gender in tariff classifications—is not appropriate for judicial resolution because it involves issues of trade policy reserved to the political branches. Specifically, the government argues that the formation and adoption of the tariff provisions at issue here involve the negotiation of agreements with foreign governments and that Plaintiff's claim challenges the substance of those international trade agreements. The government argues that there are no judicially manageable standards for reviewing the results of these inter-

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> [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. The government relies primarily on the first two characteristics.

national trade agreements. To the government, "[w]hether the rates provided in the Harmonized Tariff Schedule should be equalized with regard to products classified based upon gender or age related characteristics is a political question that the Court should decline to adjudicate." Def.'s Mot. to Dismiss, at 14.

Plaintiff properly replies that the specific provisions of the HTSUS constitute statutes enacted by Congress pursuant to Section 1204(c) of the Omnibus Trade and Competitiveness Act of 1988.[6] 19 U.S.C. § 3004(c). Citing this statutory structure, Plaintiff reasons that its Complaint is a garden-variety equal protection claim challenging the statute imposing tariffs and in no way implicates the negotiation of international agreements that may precede statutory enactment. Rather than intrude in areas delegated to the executive or legislative branch, Plaintiff claims that its Complaint invokes traditional constitutional equal protection standards readily subject to judicial administration.

In support of its argument, Plaintiff invokes the Supreme Court's analysis in Japan Whaling, which explains that:

> [N]ot every matter touching on politics is a political question . . . and more specifically, that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." . . .

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[6] Further citations to the 1988 Act are to relevant provisions in Title 19 of the U.S. Code, 2000 edition.

> As Baker plainly held, [] the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. . . . We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.

Japan Whaling, 478 U.S. at 229-30 (quoting *Baker*, 369 U.S. at 211).[7]

The Supreme Court's admonition in *Japan Whaling* is directly applicable here. In the case before us, even if the challenged statutory provisions originated in international negotiations, those provisions have since been enacted into law as the HTSUS. Thus, this Complaint does not challenge the actions of the President or Congress in their respective spheres of responsibility for foreign commerce or foreign relations. Rather, it involves constitutional review of a domestic statute. It has long been the role of the court to adjudicate legislative classifications in view of the

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[7] For a more extensive discussion of Japan Whaling's holding with regard to the political question doctrine, see *Canadian Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321, 1355-56 (2006).

importance of the governmental interests involved. See *United States v. Carolene Products Co.*, 304 U.S. 144, 153, 58 S. Ct. 778, 82 L. Ed. 1234 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." (citations omitted)). In the light of this history and precedent, it is clear that review of statutory provisions, using constitutional standards, is manifestly within the judicial realm. Such review is, if anything, more appropriate here than in Japan Whaling, which involved evaluation of the Japanese whaling industry, a matter even more removed from the domestic realm than that at issue here.

Thus, Totes' challenge to the discriminatory operation of the HTSUS properly invokes the Court's traditional role of—and standards for—constitutional review. Therefore, the Court denies the government's request that Totes' Complaint be dismissed under the political question doctrine.[8]

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[8] Although the government also argues that Totes' Complaint should be viewed as raising a political question because the relief Totes' seeks would raise the "potential for embarrassment from multifarious pronouncements and [contrary to the] need for adherence to [a] political decision," the judiciary's application of the constitutional parameters for gender and age discrimination to tariff classifications should produce no more than one clear determination. Nor would the remedy Totes seeks require the government to raise

II. Standing

A. Constitutional Standing

Because federal judicial jurisdiction arises from the Constitution, in order to bring its case here, Totes must demonstrate that its claim qualifies as a "case" or "controversy" for purposes of Article III of the Constitution, and specifically that it has a sufficient stake in the matter to establish its "standing" to bring its claim. *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1331 (Fed. Cir. 2008) ("There is no case or controversy within the meaning of the Constitution unless the plaintiff has standing.").

To establish a sufficient stake for purposes of Article III standing, plaintiffs must demonstrate: (1) that they have suffered some injury-in-fact; (2) that there is a causal connection between the defendant's conduct and this injury-in-fact; and (3) that this injury is redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) ("Defenders of Wildlife") (citations omitted).[9]

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duties on gloves for other persons in violation of any international trade agreement; just the contrary. Totes seeks a reduction not an increase in the allegedly discriminatory rates. Accordingly, this litigation does not raise the alternative concern advanced by the government.

[9] Because Totes claims a violation of the Constitution's Equal Protection guarantee, we need not be diverted by the government's citation of the absence of a substantive Due Process right of importation, see *Arjay Associates, Inc. v. Bush*, 891 F.2d 894, 896 (Fed. Cir. 1989) ("[N]o one has a constitutional right to conduct foreign commerce in products excluded by Congress"), as compared to recognition of a pro-

We consider, in order, each prong of the *Defenders of Wildlife* test. First, as noted above, Totes' Complaint alleges that the government has assessed and Totes has paid customs duties at the 14 percent rate. Complaint at 2. Thus, Totes alleges that it has suffered an injury in fact—the loss of money. Second, Totes also alleges that this injury is a result of—or caused by—the government's allegedly discriminatory tariff rates. Finally, to the extent this rate is unconstitutionally discriminatory, Totes seeks restoration, with interest, of any excess duty paid. Complaint at 7. Thus, Totes seeks redress in the form of a return of the excess tariffs imposed. Grant of this redress is manifestly within the historic power of this Court, see, e.g., *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 365-66, 118 S. Ct. 1290, 140 L. Ed. 2d 453 (1998) (affirming the CIT's conclusion that the Harbor Maintenance Tax is unconstitutional and that duties collected pursuant to the tax must be refunded), and is the requested and likely outcome of this action were Totes to prevail. See *Litecubes, LLC v. Northern Light Products, Inc.*, 523 F.3d 1353, 1360 (Fed. Cir. 2008) ("Subject matter

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cedural Due Process right. See *NEC Corp. v. United States*, 151 F.3d 1361, 1370-71 (Fed. Cir. 1998). "[E]ven though a person has no 'right' to a valuable governmental benefit," the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). Because Totes has alleged that the challenged tariff rates infringe upon its interests by unconstitutionally discriminating on the basis of gender, the government's assertion that Totes has no vested right to import is irrelevant to the analysis of Totes' standing and to the claims upon which that standing is based.

jurisdiction does not fail simply because the plaintiff might be unable to ultimately succeed on the merits." (citation omitted)). Accordingly, Totes' allegations provide a sufficient basis to establish Totes' constitutional standing to bring its claim.

Despite the fact that Totes has paid the allegedly discriminatory tariff rates, the government argues that Totes' injury is too indirect to permit standing here. To the government, because the tax imposed by the tariff provision must be paid by all importers of men's leather gloves, Totes pays the same tariff as other similarly situated importers, and is therefore not subject to discriminatory treatment. But there is no obligation requiring, a plaintiff challenging an allegedly express suspect governmental classification to plead and prove the existence of a similarly-situated non-protected class. *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000) ("Plaintiffs are correct, however, that it is not necessary to plead the existence of a similarly situated non-minority group when challenging a law or policy that contains an express, racial classification."), overruled in part on other grounds by *Gonzaga Univ. v. Doe*, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002).

The government also argues that the tariff rates challenged here tax products, not people, and that therefore Totes is not itself the object of any prohibited discrimination. This issue, however, was addressed in Craig v. Boren, where a beer vendor was allowed by the Supreme Court to pursue the equal protection claims of 18-21 year old males against the relevant statute which permitted beer purchases by 18-21 year old females. *Craig v.*

Boren, 429 U.S. 190, 194-7, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976). "[W]here a person is effectively used by the government to implement a discriminatory scheme," he may invoke the rights of the infringed to challenge that scheme. *Fraternal Order of Police v. United States*, 332 U.S. App. D.C. 49, 152 F.3d 998, 1002 (D.C. Cir. 1998). If anything, Totes' role as payor of the allegedly discriminatory tax makes its standing here more directly connected to that scheme than the interest of the beer vendor found sufficient in Craig.[10]

B. Prudential Standing

In addition to challenging Totes' constitutional standing to bring this case, the government also argues that Totes lacks standing for "prudential" reasons. See *Clarke v. Sec. Indus. Ass'n*, 479 U.S.

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[10] Although Totes' claim that the Constitution "prohibits the defendant from discriminating in the assessment of taxes or duties on the basis of gender or age," (Complaint at 5), could give rise to further analysis of Totes' possible third-party standing on behalf of adult male purchasers of gloves, Totes expressly indicated at oral argument that it does not seek derivative or third-party standing such as that recognized by Craig or *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). It is therefore unnecessary to determine whether Totes' allegations would indicate that "enforcement of the challenged [provision] . . . would result indirectly in the violation of third parties' rights." *Craig*, 429 U.S. at 195 (quoting *Warth v. Seldin*, 422 U.S. 490, 510, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)); see also *Craig*, 429 U.S. at 196 ("[C]rucial to the decision to permit jus tertii standing [is] the recognition of 'the impact of the litigation on the third-party interests.'" (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 445, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972))).

388, 396, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1986) (" '[T]he interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " (quoting *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970))). This "zone of interest" requirement "denies a right of review if the plaintiff's interests are [ ] marginally related to or inconsistent with the purposes implicit" in the constitutional guarantee invoked. *Clarke*, 479 U.S. at 399.

The Supreme Court has further maintained that the "zone of interest" test operates under the presumption that agency actions are subject to judicial review, and therefore, the test "is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke*, 479 U.S. at 399-400 (citation and footnote omitted); see also *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488-9, 118 S. Ct. 927, 140 L. Ed. 2d 1 (1998) ("Although our prior cases have not stated a clear rule for determining when a plaintiff's interest is 'arguably within the zone of interests' to be protected by a statute, they nonetheless establish that we should not inquire whether there has been a congressional intent to benefit the would-be plaintiff."). Rather, the zone of interest test only "denies a right of review if the plaintiff's interests are [ ] marginally related to or inconsistent with the purposes implicit in the statute . . . ." *Clarke*, 479 U.S. at 399; see also

Kemet Elecs. Corp. v. Barshefsky, 21 CIT 912, 927-28, 976 F. Supp. 1012, 1026 (1997) (citing *Clarke*).

The constitutional equal protection guarantee at issue in this case clearly protects against discrimination on the basis of sex. *Craig v. Boren*, 429 U.S. at 197. Because Totes alleges that its injury is the direct result of prohibited discrimination, which is both facial and express, Totes' claim is not "marginally related to or inconsistent with the purposes" of the *equal protection clause*.

Accordingly, because Totes' claim, as alleged, is within the zone of interests protected by the Constitution's Equal Protection guarantee, there is no prudential reason to deny Totes standing to litigate its claim.

III. Failure to State a Claim

We turn now to the adequacy of Totes' factual pleadings, explaining why Totes' Complaint, as presently drafted, fails to "show" the necessary entitlement to relief.

As noted above, Totes' Complaint alleges a prohibited governmental classification "based on sex." The applicable pleading requirements, however, as set out in Fed. R. Civ. P. 8(a), and recently explained by the Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) ("Bell Atlantic"), mandate "more than labels and, conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic*, 127 S. Ct. at 1964-65 (citation omitted). While it is not necessary for a plaintiff to provide detailed factual allegations, the factual allegations asserted must still be "enough to raise a right to relief above the spec-

ulative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 1965 (citation omitted).[11] In so doing, a plaintiff must still provide " 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* at 1964 (citing *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).[12]

While the contours of this requirement have not yet been broadly addressed by the Federal Circuit, other circuits have considered the issue. The Second Circuit, for example, has interpreted Bell Atlantic as "requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some allegations in those contexts where such amplification is needed to render the claim plausible." *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007) (emphasis omitted). As the Third Circuit has explained, "there must be some showing sufficient to justify moving the case beyond the pleadings to the next stage of litigation."

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[11] In Bell Atlantic, the Court disavowed the oft-cited standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Bell Atlantic, supra*, 127 S. Ct. at 1959-60.

[12] The Federal Circuit has indicated that Bell Atlantic does not alter notice pleading as a requirement or practice. *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357-8 (Fed. Cir. 2007) (discussing the "low bar" for pro se plaintiffs).

Phillips v. County of Allegheny, 515 F.3d 224, 234-5 (3d Cir. 2008).

Here, we must apply *Bell Atlantic's* pleading requirement to Totes' equal protection claim. In order to state such a claim for violation of the *equal protection clause* based on gender, Totes must allege that the government has engaged in gender-based discrimination without an exceedingly persuasive justification, or in other words, that the government has used discriminatory means that are not substantially related to important governmental objectives. *United States v. Virginia*, 518 U.S. 515, 532-33, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996); *Craig v. Boren*, 429 U.S. at 197 (1971) ("To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").[13] In so doing, Totes' complaint must include a factual allegation that demonstrates a governmental purpose to discriminate. *Washington v. Davis*, 426 U.S. 229, 242, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976) (noting that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . ."). Whether the prohibited discrimination is overt or covert, *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256,

[13] Because the pleading requirements for invidious discrimination based on age are not less than for such discrimination based on sex, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000) ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."), we need not discuss them separately.

273, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979), Totes' Complaint must allege facts sufficient to "show" some purpose or intent to disfavor individuals because of their sex, though such purpose or intent need not be malicious. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270-1, 113 S. Ct. 753, 122 L. Ed. 2d 34 *(1993)*. In *Bray*, the Court stated:

> We do not think that the "animus" requirement can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women. It does demand, however, at least a purpose that focuses upon women by reason of their sex-for example (to use an illustration of assertedly benign discrimination), the purpose of "saving" women because they are women from a combative, aggressive profession such as the practice of law. . . .
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> . . . . Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews.

Id. at 269-70 (emphasis omitted).

A facial or express gender-based classification may, of course, indicate a discriminatory purpose, see, e.g., *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 694 (6th Cir. 2006) ("Disparate treatment based upon facially gender-

based classifications evidences an intent to treat the two groups differently"), and Totes' Complaint does allege the express use of gender in the tariff classification scheme. The Complaint, however, does not allege discrimination "based on" gender, i.e., that the duty or tax imposed by the tariff classification, or any burden resulting from that tax, is imposed because of or based on gender or otherwise disfavors individuals because of their gender. Thus, the Complaint does not allege sufficient facts to establish that the government has engaged in gender-based discrimination. This is because the tariff provisions that Totes challenges are not "actual use" provisions, i.e., the tariff provisions at issue do not require that the imported goods be actually sold to or used by people of one sex or of some age category.[14]

To classify imports as men's gloves, or gloves "for other persons" does not establish that they will be bought by or used by men, or that men will necessarily pay the allegedly discriminatory tax. "For" is used to indicate objective. Thus the mere allegation that the HTSUS classifies or labels goods as imported "for" persons of one sex does not establish that those classifications are "on the basis of" or "by" gender. "On the basis of" indicates foundation or fundamental element rather than objective. As the Supreme Court explained in *Allegheny Pittsburgh Coal Co. v. County Comm'n*

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[14] Rather, the challenged classifications indicate "chief" or "principal" use, and it is well established that where classification is proper under the doctrine of chief (now principal) use, there must be proof of such use. *Advance Solvents & Chemical Corp. v. United States*, 34 CCPA 148, 151 (1947).

of Webster Country, W. Va., 488 U.S. 336, 343, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989), "[t]he *Equal Protection Clause* applies only to taxation which in fact bears unequally on persons or property of the same class." (internal quotations omitted) (emphasis added).[15]

According to Totes' Complaint, by distinguishing between men's gloves and gloves for women, the HTSUS distinguishes between property of the same class (leather gloves), and this discrimination is made on the basis of the gender and/or age of the intended user. Pl.'s Resp. to Def.'s Mot. to Dismiss 38 ("Pl.'s Br."). But the facts alleged—merely "distinguishing" between gloves for men and gloves for other persons—are not sufficient to show discrimination "on the basis of" sex.[16] Moreover, the discrimination alleged in Totes's Complaint, results from the imposition of the duty, or tax, imposed by the tariff classifications. Complaint at 6. But, as alleged in the Complaint, that

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[15] Allegheny Pittsburgh Coal involved the implementation of state law, and the different methods used to assess property values for recently-purchased properties as opposed to property held for a longer time. Recognizing that a State "may divide different kinds of property into classes and assign to each class a different tax burden," the Court applied a low level of scrutiny, explaining that the state's ability to assign these different tax burdens existed "so long as those divisions and burdens are reasonable." *Allegheny Pittsburgh Coal*, 488 U.S. at 344 (citing *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-27, 79 S. Ct. 437, 3 L. Ed. 2d 480, 82 Ohio Law Abs. 312 (1959) ("Bowers")).

[16] Totes agrees, for example, that it would not be gender-based discrimination for the government to "classify" goods for statistical purposes on the basis of the gender of the intended wearer of those goods.

duty or tax falls on importers, and there is no factual indication in the Complaint that the classification results in a discriminatory application of the tax.[17] Therefore, Totes' additional allegation of discrimination "on the basis of sex" is simply conclusory, in violation of the *Bell Atlantic* requirement. See also *Judge v. City of Lowell*, 160 F.3d 67, 75 (1st Cir. 1998) (requiring "*specific, non-conclusory factual* allegations giving rise to a reasonable inference of racially discriminatory intent"). After Bell Atlantic, it appears that the Plaintiff is required to allege facts that could provide a showing that Totes is entitled to relief.

To be clear, were this a facially discriminatory tax, Plaintiff's pleadings could be sufficient; in addition, we do not ignore the fact that the tariff schedule makes an express reference to gender. Nor do we assume that this express reference is necessarily benign. Nonetheless, because the challenged tariff classifications are, at worst, "in between" classifications that impose a facially discriminatory tax and classifications that are not facially discriminatory, Plaintiff must at least include an allegation that the challenged tariff classifications distribute the burdens of the tax

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[17] Cf. *Engquist v. Oregon Dept. of Agriculture, U.S.*, 128 S. Ct. 2146, 170 L. Ed. 2d 975, 2008 WL 2329768 at *6 (2008) ("Our equal protection jurisprudence has typically been concerned with governmental classifications that 'affect some groups of citizens differently than others.'" (quoting *McGowan v. Maryland*, 366 U.S. 420, 425, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961))). Nor can Plaintiff claim that the alleged discrimination affects importers differently based on gender. Rather, the tariff classifications affect importers based on the goods they import.

rate imposed in a way that disadvantages one sex as a whole, or has a disproportionate impact based on sex. To the extent that the challenged tariff provisions do not impose a facially discriminatory tax, Plaintiff must include an allegation of some intent that renders plausible the claim that the discrimination at issue is invidious, arbitrary or unreasonable.[18] In the absence of such allegations, the Complaint does not provide "plausible grounds to infer" a violation of equal protection or allege "enough fact to raise a reasonable expectation that discovery [or further proceedings on the merits] will reveal evidence of illegal" conduct. *Bell Atlantic*, 127 S. Ct. at 1965. While classification of goods as "for" men—or for other persons—may suggest discrimination, it does not "show" it. As pleaded, we simply are not informed of a discriminatory purpose or intent or of the character of the discrimination that Totes seeks to remedy. We are left to hypothesize: Is the challenged discrimination based on the baggage of sexual stereotypes? Does it unconstitutionally distribute the benefits and burdens of taxation? Is it prohibited intentional discrimination? Because the Complaint, as presently stated, does not "show" what the basis of Totes' entitlement is, it must be dismissed, without prejudice, for failure to state a claim.

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[18] Cf. *Mfrs. Hanover Trust Co. v. United States*, 775 F.2d 459, 465 (2d Cir. 1985) (examining whether gender-based mortality tables used in calculating an estate's tax obligations were "invidious" by examining their "(1) aggregate impact on [the] class; (2) demeaning generalizations; (3) stereotyped assumptions; and (4) flawed use of statistics").

/s/ DONALD C. POGUE
DONALD C. POGUE, *Judge*

Dated: July 3, 2008
New York, N.Y.

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(3)

No. 09-1360

In the Supreme Court of the United States

TOTES-ISOTONER CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the provisions of the Harmonized Tariff Schedule of the United States at issue in this case, which impose higher rates of duty on imported "[m]en's" seamed leather gloves than on seamed leather gloves "[f]or other persons," violate the equal protection component of the Due Process Clause.

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TOTES-ISOTONER CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-29a) is reported at 594 F.3d 1346. The opinion of the United States Court of International Trade (Pet. App. 49a-71a) is reported at 569 F. Supp. 2d 1315. The opinion and order of the CIT denying the parties' motions for reconsideration (Pet. App. 30a-48a) is reported at 580 F. Supp. 2d 1371.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2010. The petition for a writ of certiorari was filed on May 6, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Harmonized Tariff Schedule of the United States (HTSUS) classifies goods imported into the United States and establishes the import duties for each classification.[1] This case concerns the HTSUS provisions establishing applicable duties on imported seamed leather gloves. HTSUS Subheading 4203.29.30 provides for a duty rate of 14% *ad valorem* for "[m]en's" seamed leather gloves. Subheadings 4203.29.40 and 4203.29.50 provide for a duty rate of 12.6% *ad valorem* for seamed leather gloves, lined or unlined, "[f]or other persons." Pet. App. 4a-5a (quoting HTSUS § VII, Ch. 42).

2. Petitioner, a United States importer of men's seamed leather gloves, filed suit in the United States Court of International Trade (CIT) challenging the HTSUS provisions governing seamed leather gloves. Petitioner argued that, by imposing different import duty rates for men's gloves and gloves "[f]or other persons," the relevant HTSUS provisions "discriminate on the basis of gender or age" in violation of the equal protection component of the Due Process Clause. Compl. ¶ 1; see Pet. App. 5a. Petitioner sought to recover customs duties assessed against it under HTSUS Subheading 4203.29.30. Compl. ¶ 1.

The CIT dismissed petitioner's complaint. Pet. App. 49a-71a. The court rejected the government's threshold arguments that petitioner's claim presented a non-justiciable political question and that petitioner lacked standing. *Id.* at 51a-63a. The CIT concluded, however, that petitioner had failed to state a claim upon which relief could be granted because petitioner's allegations were

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[1] The HTSUS is available at http://www.usitc.gov/tata/hts.

insufficient to give rise to an inference of intentional gender discrimination. *Id.* at 63a-70a.

While acknowledging that the tariff schedule "makes an express reference to gender," Pet. App. 69a, the CIT explained that "[t]o classify imports as men's gloves, or gloves 'for other persons' does not establish that they will be bought or used by men, or that men will necessarily pay the allegedly discriminatory tax," *id.* at 67a. In the absence of an allegation that the tariff classifications "impose a facially discriminatory tax," *id.* at 70a, the court concluded, petitioner was required to include "a factual allegation that demonstrates a governmental purpose to discriminate," *id.* at 65a; see *id.* at 70a. The CIT determined that "classification of goods as 'for' men" was insufficient to show such a purpose. *Ibid.*

Both parties filed motions for reconsideration, the government on jurisdictional grounds and petitioner on the merits. The CIT denied both motions. Pet. App. 30a-48a. The court rejected petitioner's argument that "the complaint's pleading of the existence of a gender-based classification suffices to establish an inference of unconstitutional discrimination." *Id.* at 41a. The CIT explained that "the court will only excuse the plaintiff's requirement to demonstrate either discriminatory intent or that the law at issue actually caused unconstitutional discrimination after the plaintiff has shown that the provision is facially discriminatory." *Id.* at 41a-42a. The CIT further explained that the HTSUS is not facially discriminatory, but "merely distinguishes between two similar products." *Id.* at 44a.

3. The court of appeals affirmed. Pet. App. 2a-29a. The court held that petitioner had third-party standing to pursue the equal protection rights of male glove purchasers, *id.* at 8a-11a, and that its claims were otherwise

justiciable.[2] On the merits, however, the court held that petitioner had failed to state a claim that the tariff classification unconstitutionally discriminates between "items of property of the 'same class.'" *Id.* at 15a. The court explained that "allegations of such discrimination are judged under the rational basis test." *Ibid.* The court concluded that petitioner had "failed to allege facts sufficient to show that men's and women's gloves are property of the same class" because those articles are "separate commodities, moving in different channels of trade and presenting different commercial issues with respect to domestic manufacturers." *Ibid.*

The court of appeals also rejected what it understood to be petitioner's primary argument: that the HTSUS facially discriminates on the basis of the gender of persons who use gloves. Pet. App. 17a-18a & n.6, 24a. The court framed the relevant question as "whether the allegation of disparate impact of the tariff provisions with respect to male glove users is sufficient to create a prima facie case of sex discrimination." *Id.* at 18a. In addressing that issue, the court explained that "disparate impact standing alone does not establish a violation of equal protection." *Id.* at 19a. The court acknowledged that in some contexts, such as jury selection, an allegation of disparate impact alone "may in fact be sufficient to make out a prima facie case of discrimination." *Id.* at 19a-20a. But the court concluded that, "in the area of taxation and tariffs, something more than disparate impact is required to establish a purpose to discrim-

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[2] The court of appeals held that the CIT had jurisdiction under its residual jurisdiction provision, 28 U.S.C. 1581(i), Pet. App. 6a-8a, and that review was not barred by the political question doctrine, *id.* at 11a-13a.

inate for the purposes of pleading an equal protection violation." *Id.* at 23a.

The court of appeals explained that Congress's classification of goods for the imposition of tariffs "as a general matter is not concerned with the characteristics of the ultimate retail users of goods," but is rather "designed to promote particular trade policy objectives negotiated with other countries." Pet. App. 20a. The court of appeals concluded that, "[a]bsent a showing that Congress intended to discriminate against men in the tariff schedule," the court could not "simply assume the existence of such an unusual purpose from the mere fact of disparate impact." *Id.* at 22a. The court further explained that "[a] contrary ruling would call into question all taxes on items which are disproportionately consumed by any identifiable group." *Id.* at 23a. The court of appeals also concluded that the same reasoning "necessarily" applied to petitioner's claim of unconstitutional age discrimination, since such discrimination is "subject only to rational basis review." *Id.* at 25a.

Judge Prost filed a separate opinion concurring in the result. Pet. App. 25a-29a. Although Judge Prost objected to what she viewed as "the majority's treatment of trade law as an exception to this country's equal protection jurisprudence," *id.* at 25a, she agreed that petitioner's complaint was properly dismissed. Judge Prost would have held that the challenged tariff schedule "is not facially discriminatory" because "[i]t imposes a burden on importers, not gender- or age-based classes of people." *Id.* at 27a; see *id.* at 28a ("Much like tuxedos and evening gowns are different products, men's and women's gloves are different products."). Judge Prost further explained that petitioner had not alleged facts indicating that the differential tariff rates result in any

adverse impact on male glove users. *Id.* at 28a-29a. She noted in particular that petitioner had "confirmed at oral argument before [the court of appeals] that it does not allege that the cost of the higher tariff is passed on to consumers." *Id.* at 29a.

ARGUMENT

Petitioner contends (Pet. 17-29) that the challenged HTSUS provisions, by imposing higher tariffs on men's seamed leather gloves than on seamed leather gloves "[f]or other persons," unconstitutionally discriminate on the basis of gender and age. Petitioner also argues (Pet. 30-35) that it has standing to press its equal-protection claim on its own behalf, rather than on behalf of male users of seamed leather gloves. Those contentions lack merit and do not warrant this Court's review.

1. Petitioner contends (Pet. 17-24) that the HTSUS provisions governing seamed leather gloves facially discriminate on the basis of gender and are therefore invalid unless they are "substantially related to achievement" of "important governmental objectives." *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). The court of appeals correctly rejected that contention, see Pet. App. 24a, and its disposition of the issue does not warrant further review.[3]

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[3] Petitioner also contends (Pet. 17-21) that the HTSUS unconstitutionally discriminates on the basis of age. Unlike gender discrimination, however, laws that are alleged to discriminate on the basis of age are subject only to rational-basis review. See *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 83-84 (2000); see also Pet. App. 25a. The petition for a writ of certiorari makes no argument that Congress lacks a rational basis for imposing different duties on children's and adult gloves, and thus offers no reason for this Court to review the dismissal of petitioner's age-discrimination claim. See *ibid.*

a. Because "[c]lassifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination," this Court has held that gender-based classifications "require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause." *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 273 (1979). The HTSUS provisions at issue in this case, however, are not gender-based classifications. As the concurring judge explained, the HTSUS "distinguishes on the basis of products, not natural people." Pet. App. 27a-28a (Prost, J., concurring in the result). Although, as petitioner emphasizes, the HTSUS "refers to gender ('men's')," Pet. 20, it does so not to describe a class of people on the basis of their gender, but to describe a kind of seamed leather glove based on the principal use for which it is designed. See Pet. App. 44a (CIT explains that "the HTSUS is not facially discriminatory" but "merely distinguishes between two similar products"). Imposing different duties on gloves designed for use by men "does not constitute disparate treatment of actual men." *Id.* at 28a (Prost, J., concurring in the result).

b. Contrary to petitioner's contention (Pet. 21-24), the court of appeals' rejection of its gender-discrimination claim does not conflict with *Manufacturers Hanover Trust Co.* v. *United States*, 775 F.2d 459 (2d Cir. 1985), cert. denied, 475 U.S. 1095 (1986). In *Manufacturers Hanover Trust*, the Second Circuit concluded that the IRS's use of gender-based mortality tables to value reversionary interests of a decedent's estate was subject to heightened equal-protection scrutiny because "the value of the grantor's reversionary interest * * * is determined by calculations that treat similarly situ-

ated men and women differently." *Id.* at 462. In rejecting the argument that the challenged regulations did not discriminate on the basis of gender because they governed the taxation of estates rather than individuals, the court explained:

> The estate represents the legal interests of the decedent and the decedent's beneficiaries, who may be individual men or women. When an estate pays a tax, there is an obvious practical impact on the beneficiaries: the higher the tax, the less the estate has to distribute to the beneficiaries. There is also an impact on the decedent, since the higher the estate tax the less the decedent can benefit, through her estate, those she wishes to benefit. Estates and the laws governing them are a means of channeling effects upon individuals, and taxes on estates are just as capable, in principle, of discriminating against men or women as a tax on individuals.

Id. at 463.

In contrast to the gender-based mortality tables at issue in *Manufacturers Hanover Trust*, nothing in the HTSUS treats "similarly situated men and women differently." 775 F.2d at 463. Rather, the HTSUS simply mandates different treatment for classes of gloves that are similar in certain respects but different in others. And unlike the estates at issue in *Manufacturers Hanover Trust*, importers of seamed leather gloves do not "channel[]" the effects of a gender-based classification upon individual men and women, *ibid.*, since the application of the tariff schedule does not depend on the sex of

the gloves' purchasers. The decision below therefore does not conflict with *Manufacturers Hanover Trust*.[4]

2. Although petitioner did not clearly raise a disparate-impact argument in the courts below (see Pet. App. 18a n.6; *id.* at 29a (Prost, J., concurring in the result)), the court of appeals considered not only whether the HTSUS facially discriminates on the basis of gender, but also whether an allegation of disparate impact on male glove users would give rise to a cognizable claim of unconstitutional gender discrimination. The court concluded that such an allegation would not be sufficient to create an inference of intentional gender discrimination.

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[4] Relying on the "channeling effects" language of *Manufacturers Hanover Trust*, petitioner argues that "import duties are clearly capable of channeling effects on people, as disparate impact on men who wear gloves is entailed from the statute." Pet. 22 n.15. As we explain below (see p. 13, *infra*), petitioner failed to allege facts suggesting that the challenged HTSUS provisions have actually caused such a disparate impact. And even if such an impact could be shown, that would not mean that the HTSUS itself facially discriminates on the basis of gender.

Petitioner also contends (Pet. 23) that the court of appeals' decision in this case conflicts with *Manufacturers Hanover Trust* because the court below "ruled that taxation must always be reviewed under the rational basis test, whereas the Second Circuit correctly recognized that intermediate scrutiny is the proper test for reviewing gender-based taxation." That argument reflects a misreading of the court of appeals' decision. The court did not hold that "taxation must always be reviewed under the rational basis test," Pet. 23, even if it involves facial gender discrimination; it instead held that rational-basis review applies to claims that a tax law unconstitutionally distinguishes between items of property of the same class, Pet. App. 15a. Nor did the court of appeals disagree with the proposition that "intermediate scrutiny is the proper test for reviewing gender-based taxation." Pet. 23. Rather, it rejected petitioner's argument that the HTSUS provisions establishing the rates of duty on seamed leather gloves are gender-based. See Pet. App. 24a.

Id. at 21a-24a. Petitioner contends (Pet. 24-29) that the court's conclusion "represent[s] a sharp departure from established equal protection jurisprudence." Pet. 25. That argument lacks merit and does not warrant further review.

a. As petitioner acknowledges (Pet. 24), "official action will not be held unconstitutional solely because it results in a * * * disproportionate impact" on persons of a particular race or sex. *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-265 (1976). A facially neutral law with a "disproportionately adverse effect" on a prohibited basis "is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." *Feeney*, 442 U.S. at 272. To establish the requisite discriminatory purpose, the plaintiff must show that the relevant governmental official "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279.

As the court of appeals noted, "[a]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily" on one group than another. Pet. App. 19a (quoting *Washington* v. *Davis*, 426 U.S. 229, 242 (1976)). This Court has explained that, in "rare" cases, a "stark" pattern of disparate effects, "unexplainable on grounds other than race," may, standing alone, support a finding of discriminatory purpose. *Arlington Heights*, 429 U.S. at 266 (citing, *inter alia*, *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), and *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960)); see *id.* at 266 n.13 (noting that this Court has applied that approach in

jury-selection cases). Ordinarily, however, "impact alone is not determinative." *Id.* at 266.

Unlike in *Yick Wo* or *Gomillion*, any disparate impact on male glove users resulting from the HTSUS provisions at issue here is easily explained on grounds other than intent to discriminate on the basis of gender. Men's gloves and women's gloves have long been treated as separate commodities. See Pet. App. 15a & n.5; see also *id.* at 21a-22a (noting that "it is quite possible, even likely, that the different tariff rates for men's and other gloves reflect the fact that such gloves are in fact different products, manufactured by different entities in different countries with differing impacts on domestic industry"); cf. *id.* at 28a (Prost, J., concurring in the result) ("Much like tuxedos and evening gowns are different products, men's and women's gloves are different products."). When Congress assigns different duty rates to different goods in its tariff schedules, it is generally concerned with "trade policy objectives negotiated with other countries," not "the characteristics of the ultimate retail users of goods." *Id.* at 20a. As the court below correctly observed, "[a]bsent a showing that Congress intended to discriminate against men in the tariff schedule," a court cannot "simply assume the existence of such an unusual purpose from the mere fact of disparate impact." *Id.* at 22a. And as the court also correctly noted, a contrary conclusion "would call into question all taxes on items which are disproportionately consumed by any identifiable group." *Id.* at 23a. In this context, an allegation of disparate impact alone does not establish a cognizable claim of intentional gender discrimination.

2. Petitioner argues (Pet. 24-29), that the court of appeals' decision conflicts with *Bray* v. *Alexandria*

Women's Health Clinic, 506 U.S. 263 (1993). Petitioner points in particular to this Court's observation in *Bray* that "[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews." *Id.* at 270. In petitioner's view, "[i]t follows that a higher duty on gloves imported for men is not only a discriminatory duty on men for purposes of equal protection, but also a discriminatory duty on importers." Pet. 25. But as the court of appeals explained, "[m]en's gloves are hardly an irrational object of disfavor, and a tax on them creates no compelling inference that Congress intended to discriminate against men." Pet. App. 24a. Petitioner provides no reason to think that the imposition of higher import duties on men's seamed leather gloves than on other seamed leather gloves stands as "an irrational surrogate for opposition to" men. *Bray*, 506 U.S. at 270.

c. Focusing on the court of appeals' discussion of Congress's trade-policy motives in creating tariff classifications, petitioner also argues that "equal protection guarantees would be eviscerated if the government could defeat [petitioner's] claim simply by referring to the likelihood that a differentiation was motivated by protectionism, favoritism, and official policy." Pet. 27; see *ibid.* ("[O]therwise unobjectionable government goals can violate equal protection when they are, as here, furthered by opportunistic discrimination in the form of *ad valorem* exactions based facially on age or gender."). Contrary to petitioner's suggestion, however, the court of appeals did not refer to Congress's trade-policy objectives as a justification for explicit gender

discrimination. Rather, the court referred to those objectives as a plausible alternative explanation, other than intent to discriminate against male glove users, for its differential treatment of men's seamed leather gloves and seamed leather gloves "[f]or other persons." Pet. App. 20a-22a. Petitioner offers no reason to question that conclusion.

d. In any event, even if proof of a disparate impact in this context could give rise to an inference of intentional sex-based discrimination, petitioner could not prevail in this case because it neither clearly relied on a disparate-impact theory below, see Pet. App. 18a n.6; *id.* at 27a (Prost, J., concurring in the result), nor alleged facts that would tend to show a disparate impact on male glove users, *id.* at 29a (Prost, J., concurring in the result). As Judge Prost observed, petitioner's complaint "makes no connection between the impact of the tariff on importers and the impact on consumers." *Ibid.* In particular, petitioner "confirmed at oral argument before [the court of appeals] that it does not allege that the cost of the higher tariff is passed on to consumers." *Ibid.* Absent any basis for concluding that male glove users suffer concrete harm as a result of the challenged tariff classifications, this case provides no occasion for the Court to decide whether or under what circumstances proof of such disparate impact would suggest intent to discriminate.

3. Finally, petitioner contends (Pet. 30-35) that it has "first-party standing" to challenge the HTSUS. That claim does not warrant this Court's review. The court of appeals held that petitioner had Article III standing because it was required to pay the 14% tariff rather than the lower duty imposed on seamed leather gloves other than those for men. Pet. App. 9a. The

court further held that petitioner had third-party standing to assert the equal-protection rights of male glove users. *Ibid.*

Because petitioner is a corporation rather than a natural person, and because the challenged HTSUS provisions do not differentiate based on the sex of the importer even when the importer is an individual, petitioner could not plausibly contend that it has suffered discrimination based on its *own* gender. In any event, the court of appeals dismissed petitioners' constitutional challenge not for lack of standing, but for failure to state a claim. Petitioner offers no reason to think that the outcome of the case would have been different if the court of appeals had held that petitioner had first-party, rather than third-party, standing. This Court's review accordingly is not warranted. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842 (1984) ("[T]his Court reviews judgments, not opinions.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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TOTES-ISOTONER CORPORATION,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Pursuant to Supreme Court Rule 15.6, petitioner Totes-Isotoner Corporation ("Totes") hereby replies to new points raised in the Brief for the United States in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit.

ARGUMENT

Totes asks this Court to grant certiorari in order to determine whether certain provisions of the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202, which impose different rates of customs duty on goods based solely on the gender of the persons using those goods, "discriminate facially" on the basis of gender or age. Pet., at i. That the challenged provisions impose different rates of duty solely on the basis of gender is beyond dispute: HTSUS Subheading 4203.29.30 sets a tariff rate of 14% *ad valorem* on certain "men's" leather gloves, while each of HTSUS Subheadings 4203.29.40 and 4203.29.50 sets a tariff rate of 12.6% *ad valorem* on identical gloves "[f]or other persons." The difference in the rate of tax turns solely on the determination by an officer of U.S. Customs and Border Protection ("Customs") of the gender of the article's intended user.

In its Brief in Opposition, the United States now contends that the "HTSUS provisions at issue in this case . . . are not gender-based classifications," Br. in Opp. 7, but instead merely represent distinctions between "products," *ibid.*[1] For support,

[1] In the courts below, the United States did not dispute that the challenged tariff provisions discriminated according

the United States relies on Judge Prost's concurring opinion below (Pet. App. 25a-29a), which asserts that the HTSUS "distinguishes on the basis of products, not natural people." Pet. App. 27a-28a. Judge Prost's concurrence, which the government cites in its Brief in Opposition as dispositive of this case, also asserts that "[m]uch like tuxedos and evening gowns are different products, men's and women's gloves are different products," *id.* at 28a, while conceding that "the English language does not have different names for these particular products, thus requiring reference to the gender of the intended wearer . . . . ," *ibid.*

1. The United States' argument misapprehends the question presented by Totes' petition. Totes readily concedes that the government may, in the HTSUS, impose different rates of customs duty on goods based on differences in their nature, construction, materials, or uses. To borrow Judge Prost's example, "tuxedos and evening gowns" are clearly different classes of goods, which can be—and, in the HTSUS, are—distinguished on the basis of various characteristics that do not implicate Constitutional equal protection guarantees. Only where a difference in the rate of tax is driven *solely* by a gender classification are the Constitution's equal protection provisions implicated and, absent a governmental showing of "exceedingly persuasive justification," violated. *United States v. Virginia* (*VMI*), 518 U.S. 515, 531 (1996). This is such a case; moreover, as noted by more than 150 additional equal protection challenges

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to gender, but instead suggested that the assigned tariff rates were judicially non-reviewable under the "political question" doctrine, or, in the alternative, that Totes had not sufficiently pleaded its equal protection challenge.

currently pending in the United States Court of International Trade (USCIT), the HTSUS contains dozens of other provisions that likewise discriminate in the rate of duty imposed solely upon a gender or age determination.

2. To classify goods for duty assessment purposes without making any reference to the gender or age of the user is certainly possible; indeed, most provisions of the HTSUS do so. For HTSUS provisions to classify goods on the basis of their principal use, without implicating equal protection guarantees, is likewise possible. For example, the HTSUS in some cases distinguishes leather gloves based on whether they are "designed for use in sports." *See, e.g.*, HTSUS Subheading 4203.21. However, a "principal use" classification based on gender of the user does not ask for *what* the product is intended, but for *whom* the product is intended. When the critical determination is the gender of the person for whom the good is intended, and such determination results in a higher rate of duty than otherwise would be imposed, gender discrimination clearly has been established. Where, as here, both the requirement for Customs to make a gender determination and the higher rate of duty resulting therefrom appear expressly in the language of the statute, the statute is "facially" discriminatory, and thus the burden of defending it under equal protection principles shifts back to the Government. *See VMI*, 518 U.S. at 531. This case, and the scores of others pending in the USCIT, focus solely on those provisions of the HTSUS that (i) command the Customs official responsible for the classification to make a determination based on the gender or age of the person presumably using an imported

product and (ii) impose a higher rate of duty as a result of said determination.

3. The United States' position conflates classification choices that do not involve gender or age, (and do not implicate equal protection guarantees) with the choice mandated by statute in this case, which *does* involve gender and age classifications, and bases rates of duty on such classifications.

The HTSUS is a statute that employs a hierarchical structure of headings and subheadings in order to describe and classify merchandise, together with a series of Section and Chapter Notes, and General Rules of Interpretation to direct Customs officers in classifying imported goods.[2] The classification of merchandise, in turn, determines the rate of duty to be assessed. Customs officers are required to use the HTSUS to carry out the statutory duty set out in 19 U.S.C. § 1500(b), which requires that, for each entry of goods imported into the United States, Customs shall, *inter alia*, "fix the final classification and rate of duty applicable to such merchandise." In order for a Customs officer to classify Totes' subject gloves under HTSUS Subheading 4203.29.30, the officer must make numerous classification decisions. However, the only decision that determines whether the gloves will be taxed at the

[2] *See* HTSUS Gen. Note 7(f)(6) (describing the hierarchical structure of headings and subheadings); HTSUS Gen. R. Interpretation 1 (providing that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to" subsequent General Rules of Interpretation). The status of the HTSUS as statutory law is established at 19 U.S.C. § 3004(c)(1).

12.6% *ad valorem* rate or at the 14% *ad valorem* rate is the Customs officer's determination regarding the gender of the person who presumably will use the glove. This can be illustrated by examining the various questions that a Customs officer must answer in reaching a classification under HTSUS Subheading 4203.29.30.

First, the statute reads, in relevant part with emphasis added:

> Chapter 42—Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silkworm gut)[3]:
>
> 4203 Articles of apparel and clothing accessories, of leather or of composition leather:
>
> * * *
>
> Gloves, mittens and mitts:
>
> 4203.21 Specially designed for use in sports:
>
> * * *
>
> 4203.29 Other:
>
> Gloves of horsehide or cowhide (except calfskin) leather:
>
> * * *

[3] Pursuant to General Rule of Interpretation 1 of the HTSUS, the titles of sections, chapters and sub chapters of the HTSUS are for reference only, and do not govern classification. The title of HTSUS Chapter 42 is reproduced here for reference only.

	Other:	
4202.29.20	Not seamed . . .	
	Other:	
4202.29.30	*Men's*	*. . . 14%*

* * *

	For other persons:	
4202.29.40	*Not lined*	*. . . 12.6%*
4203.29.50	*Lined*	*. . . 12.6%*

To classify goods under this provision and assess duties, the Customs officer must make a methodical, ordered number of determinations, as follows:

Determination by Customs Officer	Consequence under HTSUS
(1) Is the product "of leather?"	If "yes," the product should be classified in HTSUS Chapter 42.
(2) Is the product an "article of apparel or clothing accessory?"	If "yes," the product should be classified in HTSUS Heading 4203.
(3) Is the article a "glove, mitten or mitt?"	If "yes," the product should be classified in either of HTSUS Subheadings 4203.21 or 4203.29.
(4) Is the glove "specially designed for use in sports?"	If "no," the product should be classified in HTSUS Subheading 4203.29.

(5) Is the glove "of cowhide or horsehide leather?"	If "no," the product cannot be classified in HTSUS Subheadings 4203.29.05 through 4203.29.18.
(6) Is the glove "seamed?"	If "no," the product cannot be classified in HTSUS Subheading 4203.29.20.

To this stage in the classification analysis, the Customs officer has made numerous determinations, none of which implicates equal protection guarantees, and none of which fixes the rate of duty to be assessed. At this point, the gloves might be subjected to duty either at the rate of 14% *ad valorem* or at the rate of 12.6% *ad valorem*. The tax rate depends solely on resolution of the following question:

Determination by Customs Officer	**Consequence under HTSUS**
(7) Is the glove a "men's" glove?	If "yes," the product is classified under HTSUS Subheading 4202.29.30, and duties are imposed at a rate of 14% *ad valorem*. If "no," the product is classified under HTSUS Subheading 4202.29.40 or 4202.29.50, in either case dutiable at the rate of 12.6% *ad valorem*.

The use of a gender identification in a test to determine the rate of duty to be imposed on the goods is the sole basis for Totes' claim. The HTSUS, on its face, requires the use of a gender classification to set the rate of duty applicable to the gloves at bar. This, Totes contends, implicates Constitutional equal protection guarantees and requires the government to offer an "exceedingly persuasive justification" for the gender-based discrimination. *VMI*, 518 U.S. at 531. This is where the Constitutional infirmity in the statute resides.

4. In carrying out its statutory mandate, Customs reaches its decision to impose the higher rate of duty complained of strictly and solely on the basis of the user's gender. *See, e.g.*, Customs Ltr. Rul. NY J81532 (Mar. 27, 2003). In classifying goods according to gender, Customs officials take into account secondary sex characteristics of the products' intended users, such as size, musculature, and contours of the body in order to determine the gender of the persons who principally will use the merchandise. *See, e.g.*, *A. Zerkowitz & Co. Inc. v. United States*, 54 Cust. Ct. 151, 160 (1965) (using differences in male and female "natural foot contours" to determine the user of imported footwear); Customs Ltr. Rul. HQ 954885 (Oct. 13, 1993) (referring to the "cut" of a garment making the garment more suitable for use by one sex). Customs also may base gender classifications on factors such as styling and labeling designed to appeal to one sex or the other. *See, e.g.*, *Customs Information Exchange Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories*, 52 Fed. Reg. 52,563, 52,564 (Dec. 28, 1988) (noting, under the heading "Apparel—Sex of Wearer," that Customs

"should . . . consider[ ]: "(1) [s]izing, (2) construction, (3) styling, and (4) other factors such as packaging, labelling, etc." in determining the sex of the principal users of various apparel products). Regardless of the specific criteria that a Customs officer may employ in making a classification of goods—which is by law presumed to be correct and supported by all required findings of fact, *see* 28 U.S.C. § 2639(a)(1)—the classification and rate of duty is driven solely by a gender determination, and is therefore subject to equal protection scrutiny.[4]

5. The United States also shifts its position when it contends that the challenged HTSUS provisions do not distinguish goods based upon the user's gender, but merely "describe a seamed leather glove based on the principal use for which it is designed." Br. in Opp. 7. Before the Federal Circuit, the United States admitted that the challenged provisions premised duty rates on gender classifications: as the Federal Circuit noted, "Indeed the government admits that 'the subheadings at issue require Customs to differentiate between gloves because they are targeted for use by specific genders.'" Pet. App. 17a (quoting Def.-Appellee's Br. 63).

The Government's contention, derived from Judge Prost's concurrence below, that "men's" gloves and gloves "for other persons" are somehow different classes of goods, distinguished by some-

[4] Some provisions of the tariff that distinguish goods according to the gender of the intended user do not establish different rates of duty based on gender differentials. By virtue of the fact that the duty rates are the same regardless of the intended user's gender or age, such provisions would not deny equal protection of the laws.

thing other than gender, is unsupported, facile, and dangerous, indicating precisely the reason for which the writ of certiorari should be issued in this case. Under this view, the government could simply write Constitutional equal protection guarantees out of existence simply by discriminating against the goods used primarily by given classes of persons, rather than against the persons themselves. This rationale could lead to a dangerous use of Congress' Taxing power to allow government to oppress a disfavored group. For example, one might justify a confiscatory tariff rate imposed on "yarmulkes" in contrast to a lower rate on "other skull caps," simply by claiming them to be different "classes" of merchandise. In like fashion, "kosher" and "other" chickens might be termed different "classes" of goods, and taxed differently. Numerous other measures targeted at goods principally used by particular religious, racial, ethnic, gender, or age groups could be justified by this simple expedient—which is the very rationale used by the lower court to hold that the HTSUS provisions challenged here are not "facially" discriminatory.

The flaw of this approach is evident in Judge Prost's concurring opinion below, where she concedes that "[t]he happenstance that the English language does not have separate names for these particular products [men's and women's gloves], thus requiring reference to the gender of the intended wearer, does not transform the distinction into facial discrimination." Pet. App. 28a. Totes respectfully suggests that the flaw is not in the limitations of the English language; rather, Judge Prost's inability to articulate any distinction between the products other than in terms of

gender shows the statutory language to be facially discriminatory.

6. The United States seeks to distinguish *Manufacturers Hanover Trust Co. v. United States*, 775 F.2d 459 (2d Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986), on the ground that "nothing in the HTSUS treats 'similarly situated men and women differently'[; r]ather, the HTSUS simply mandates different treatment for classes of gloves that are similar in certain respects but different in others." Br. in Opp. 8 (quoting *Mfrs. Hanover Trust Co.*, 775 F.2d at 463). This statement again disregards the gender-specific basis for the statutory classification determinations that fix rates of duty. The *only* respect in which gloves are different, for duty-rate purposes, is whether the user will be a man or a woman. The gloves are identical in all other ways. Similarly situated men and women—the persons who use the imported gloves—are treated differently in that their gloves have been subjected to unequal tariff levels. As the Federal Circuit correctly noted, "[t]he claimed discrimination is based on the sex of the glove users, not the sex of the glove purchasers." Pet. App. 17a.

Likewise, the United States' argument that "unlike the estates at issue in *Manufacturers Hanover Trust*, importers of seamed leather gloves do not 'channel[ ]' the effects of a gender-based classification upon individual men and women, since the application of the tariff schedule does not depend on the sex of the gloves' purchasers," is an inadequate ground for distinction. Br. in Opp. 8-9 (quoting *Mfrs. Hanover Trust Co.*, 775 F.2d at 463). The application of the tariff schedule depends solely and entirely on the sex of the

gloves' users, all of whom are individual men and women.

CONCLUSION

The challenged HTSUS provisions discriminate in the imposition of tariffs solely on the basis of a gender determination. The United States' efforts to sweep these clear discriminations under the rug by blithely asserting that men's and women's gloves—identical in all respects save the gender of the users—are different "classes" of merchandise, is a dangerous formulation that would write equal protection guarantees out of the Constitution, and open a loophole through which persons of different gender, racial, religious, ethnic, and age groups could be oppressed through discriminatory taxation of their property. To avoid such a possibility, and to rectify equal protection violations already present in the HTSUS, this Court should grant Totes' petition for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TOTES-ISOTONER CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* COLUMBIA SPORTSWEAR COMPANY, *et al.* IN SUPPORT OF PETITION

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INTEREST OF *AMICI CURIAE*

Columbia Sportswear Company, Mountain Hardwear, Inc., Payless ShoeSource, Inc., The Stride Rite Corporation, and Mia Shoes, Inc., by their filing of this brief as *amici curiae*, respectfully urge this Court to grant the petition for a writ of certiorari filed by Totes-Isotoner Corporation ("Totes").[1] *Amici curiae* are importers of footwear and apparel who have filed cases in the United States Court of International Trade ("CIT"), challenging the constitutionality of provisions of the Harmonized Tariff Schedule of the United States ("HTSUS" or "tariff") that discriminate in taxation based on gender and age.

This case is significant for these *amici* and over one hundred other importers of footwear and apparel because their cases are stayed in the CIT, pending the outcome of this case. Damages in the form of a potential

---

1. No counsel for a party authored this brief in whole or in part except that counsel for petitioner reviewed this brief and provided comments to counsel for *amici*. No counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. In addition to *amici curiae*, the following companies represented by counsel for *amici* will make a monetary contribution to the preparation or submission of this brief: Jimlar Corporation, Maggy London International, Ltd., Kohl's Department Stores, Inc., Esportia International, Inc., Group E, Ltd., Kids in Motion, and Stone Barn Industries, Inc. (f/k/a Steve and Barry's), and/or Stone Barn Manhattan LLC and/or 4004 Incorporated). The parties have been given appropriate notice of amici's intention to file and have consented to the filing of this brief. Such consents are being lodged herewith.

refund of duties paid on men's, women's or children's footwear and apparel, stemming from a violation of the Equal Protection guarantees under the Due Process Clause of the Fifth Amendment, hinge on whether this Court recognizes that Totes has stated a claim for gender and age discrimination.

Although *amici* fully endorse Totes' petition, in this brief they also urge that Totes' claim is further supported (i) by the discrimination having been "unknown to the practice of our governments," *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890), due to earlier limitations on the scope of protection afforded under the Equal Protection Clause, and (ii) by Totes having met the pleading standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and (iii) the legislative history which supports Totes' claims of an equal protection violation.

SUMMARY OF THE ARGUMENT

This Court has warned that discrimination "unknown to the practice of our governments, might be obnoxious to the constitutional prohibition." *Bell's Gap R. Co. v. United States*, 134 U.S. 232 (1890). Although gender-based customs tariffs existed as early as the 1800s, the discrimination inherent in those tariffs was unknown to the government until recent times because gender was not part of equal protection jurisprudence until the 1970s. "Notions of what constitutes equal treatment for purposes of the *Equal Protection Clause do* change," *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966), and have evolved to prohibit gender- and age-based discriminatory tariffs. They must now be struck down.

Totes' claim of an Equal Protection violation is grounded in the plain language of the tariff, which discriminates on its face on the basis of gender or age. The tariff establishes that "seamed leather gloves" are a single class of goods and the only subclassification or distinction drawn is based on gender and age. The Federal Circuit's reliance on the government's unsubstantiated allegations that men's and women's gloves move in different channels of trade and thus, must be different goods, is misplaced, particularly at the pleading stage. Any such alleged business reasons for the discrimination do not justify dismissal for failure to state a claim.

In addition, Totes has met the "plausibility" standard in its pleadings, established under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), in which this Court held that stating a claim "requires a complaint with enough factual matter (taken as true) to suggest that" a claim is "plausible." *Id.* at 556. The legislative history, including the Tariff Classification Study and congressional tariff hearings, supports Totes' claim that the gender and age discrimination in the tariff violates the Equal Protection Clause and presents "enough fact to raise a reasonable expectation that discovery [or further proceedings on the merits] will reveal evidence of illegal [conduct]." *Id.*

Passages from the Tariff Classification Study demonstrate that the government itself has questioned the economic justification for distinctions in the tariff based on gender and age, thereby undermining any argument that such gender- and age-based distinctions bear a substantial relationship serving an important

governmental purpose. Passages from the tariff hearings further show that the current small difference in duty rates discriminating against men's gloves can not protect a domestic industry making men's gloves, if it even exists.

Finally, the Federal Circuit should not have applied a merits-based rational basis test to conclude that Totes did not state a claim, in any event, when a claim of gender discrimination would be reviewed under intermediate scrutiny on the merits.

ARGUMENT

I. Equal Protection Clause Jurisprudence Has Evolved to Prohibit Gender- and Age Discriminatory Customs Tariffs.

A. *Bell's Gap's* Particular Proscription Against Discrimination "Unknown to the Practice of Our Governments" Supports Totes' Claim of an Equal Protection Violation.

In *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232 (1890), this Court found that the protections granted under the Equal Protection Clause of the Fourteenth Amendment apply to property as well as to people.[2]

2. The direct text of the Equal Protection Clause applies only to state governments, but the federal government is also bound by the same rules of equal protection by the Fifth Amendment's Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("The *Fifth Amendment* . . . does not contain an *equal protection clause* as does the *Fourteenth Amendment* which applies only to the States. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.").

States are permitted to "vary the rates of excise upon various products . . . so long as they proceed within reasonable limits and general usage." *Bell's Gap*, 134 U.S. at 237. But, the Court cautioned that equal protection principles control those different rates of exaction because differing rates that are "clear and hostile discriminations against particular persons and classes, *especially* such as are of an unusual character, *unknown to the practice of our governments*, might be obnoxious to the constitutional prohibition." *Id.* (emphasis added).

That abhorrent degree of discrimination — "unknown to the practice of our governments" — is present here, thereby precluding the argument that gender and age discrimination should not be struck down because it has long been recognized as acceptable by the government. What has been "unknown to the practice of our governments" must be measured by the standards and jurisprudence of the times.

Although gender-based customs tariffs on seamed leather gloves existed as early as 1890, and for other apparel and footwear products, even earlier than the ratification of the Fourteenth Amendment in 1868, *see, e.g.*, Speech of Mr. Severance, of Maine, on the Tariff, 28th Cong. 12-13 (May 3, 1844), the problematic discrimination inherent in those gender-based tariffs was unknown to the government until recent times. This Court did not recognize gender as a quasi-suspect class until the 1970s when it first struck down a law based on a gender classification in *Reed v. Reed*, 404 U.S. 71 (1971). Intermediate scrutiny for classifications based on gender was not firmly established until the mid-

1970s, when this Court decided *Craig v. Boren*, 429 U.S. 190 (1976). At the genesis of gender discrimination in the tariff in the nineteenth century, and indeed, even for most of the twentieth century, gender was simply not considered part of equal protection jurisprudence.[3]

This is not to say that gender discrimination in the tariff was ever acceptable, even though no legal remedy existed during that period in history. To the contrary, today we would never consider slavery acceptable, even prior to the Equal Protection Clause in 1868. Nor would we ever consider women's lack of suffrage acceptable, even prior to the ratification of the Nineteenth Amendment permitting women to vote in 1920.

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3. In 1896, during congressional tariff hearings, the Temple Glove Manufacturing Company asked that Congress eliminate the discrimination between men's and women's gloves:

> We pray you to right the great wrong done the manufacturers of ladies' gloves under the Wilson tariff and to equalize the duty on both men's and women's gloves, as the cost of making and finishing is the same. The discrimination in the Wilson tariff was simply the result of compromises, and we trust that under a Republican Government it will not be repeated.

Tariff Hearings Before the Comm. on Ways and Means, 54th Cong. 1955 (1897) (statement of Temple Glove Manufacturing Company). Even at the turn of the nineteenth century, manufacturers knew of the gender discrimination, but had no remedy to rectify such gender-based duty discrimination.

Although these discriminations existed, they were "unknown" at their inception and for years following, as equal protection jurisprudence had to evolve over time for the government to recognize these injustices. As late as 1920, the Equal Protection Clause was still considered insufficient to guarantee a women's suffrage—hence the need for a new and separate constitutional amendment. In the same way, gender discrimination in the tariff was never acceptable, but the evolution of equal protection principles has been gradual, and only *recently* do they make clear that gender-based duties are unconstitutional, despite their lurking in the tariff for many years.

As explained in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966):

> [T]he *Equal Protection Clause* is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. See *Malloy v. Hogan, 378 U.S. 1, 5-6*. Notions of what constitutes equal treatment for purposes of the *Equal Protection Clause do* change. This Court in 1896 held that laws providing for separate public facilities for white and Negro citizens did not deprive the latter of the equal protection and treatment that the *Fourteenth Amendment* commands. *Plessy v. Ferguson, 163 U.S. 537*. Seven of the

> eight Justices then sitting subscribed to the Court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear.

383 U.S. at 669 (emphasis in original).

The Equal Protection Clause has only recently caught up with gender and age discrimination. What constituted equal treatment for purposes of equal protection has changed. Because gender-based tariff discrimination in violation of the Equal Protection Clause has been "unknown to the practice of our governments," it is particularly deserving of this Court's scrutiny. *Bell's Gap R. Co.*, 134 U.S. at 237.

B. A Cause of Action for Gender- and Age-Based Discrimination Within the Single Class of Goods Established in the Tariff — Seamed Leather Gloves — Is Not Defeated By the Government's Allegations That Men's and Women's Gloves Move in Different Channels of Trade.

Citing to the brief of the government, in which the government made the unsupported allegation that historically men's and women's gloves were sourced differently, the Federal Circuit concluded that "[m]en's and women's gloves are separate commodities, moving in different channels of trade and presenting different commercial issues with respect to domestic manufacturers." *Totes-Isotoner Corp. v. United States*, 594 F3d 1346, 1354 (Fed. Cir. 2010). Apparently for this reason, the Federal Circuit rejected Totes' argument that "the

tariff classification is unconstitutional because it discriminates between similar property — men's gloves and women's gloves" and found that "Totes has failed to allege facts sufficient to show that men's and women's gloves are property of the same class." *Id.* at 1354.

Yet, in the tariff, the government itself has established that seamed leather gloves constitute a single class of goods. It draws no further distinctions or subclassifications based on physical characteristics. The only distinction it does draw is based on gender and age — whether the gloves are for men or women and children.[4] When a statute,

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4. The Tariff provides:

4203	Articles of apparel and clothing accessories, of leather or of composition leather:	
	* * *	
	Gloves, mittens and mitts:	
	* * *	
4203.29	Other:	
	Other [than seamed]:	
	Other	
4203.29.30		*Men's . . . 14%*
		For Other persons:
4203.29.40		Not lined: . . . *12.6%*
4203.29.50		Lined: . . . *12.6%*

(emphasis added). The only distinctions made within the class of seamed leather gloves are gender and age. Seamed leather gloves for men are dutiable at 14%, while seamed leather gloves for women and children are dutiable at only 12.6%. No other distinction is made within the class of seamed leather gloves.

as here, discriminates on its face on the basis of gender or age, the government's unsupported allegations of business reasons purportedly justifying the discrimination can not negate the adequacy of a properly plead Equal Protection claim.

The time, if any, to consider purported business or policy reasons for the tariff's discrimination between men's and women's gloves is during a trial on the merits, when the government may attempt to show that the tariff's gender- and age-based discrimination withstands scrutiny under the intermediate scrutiny or rational basis tests.

Under intermediate scrutiny, attempts by the government to try to explain away the discrimination in the tariff "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The government may not rely on economic conditions (or any other reasons) at the time of the discrimination's inception when those conditions, even if they existed, were not the actual reason for the discrimination in the tariff. In any event, should the trial court find it necessary to examine factors such as whether men's and women's gloves travel in different channels of trade or present different commercial issues with respect to the domestic industry, *amici* predict the evidence will show that men's and women's gloves, in fact, are *not* separate commodities, contrary to the conclusion of the Federal Circuit.

Even assuming *arguendo* that men's and women's gloves are separate commodities that move in different channels of trade and present different commercial

issues in the domestic market, those facts do not determine whether Totes has adequately pleaded an Equal Protection Clause violation. As the only distinctions in the tariff are based on gender or age, the alleged reasons for these distinctions do not justify dismissal for failure to state a claim.[5]

II. Totes Has Met the Pleading Standard of *Bell Atlantic Corp. v. Twombly.*

To state a well plead claim, U.S. Court of International Trade Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief."[6] To satisfy this rule, this Court has held that "stating such a claim requires a

5. Congress could have based the duty differences, for example, on the size of gloves, assuming that men's gloves use more leather than women's gloves and thus, perhaps present different commercial issues in the domestic market, but the fact remains that the tariff does not discriminate based on those physical differences. Instead, Congress chose to subclassify seamed leather gloves into gender and age distinctions. A tariff that sets different duty rates based solely on gender or age is discriminatory on its face in contravention of the Equal Protection Clause. It is even questionable whether duty differences based on physical characteristics of the gloves would be constitutional. One would assume that larger gloves are used by men, and smaller gloves are used by women. If the duty rate was higher on larger gloves, then arguably, such veiled distinctions may cause disparate impact on men and "[a] statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate." *Washington v. Davis*, 426 U.S. 229, 241 (1976) (*citing Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

6. CIT Rule 8(a)(2) is identical to Federal Rule of Civil Procedure 8(a)(2).

complaint with enough factual matter (taken as true) to suggest that" a claim is "plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

In *Twombly*, this Court abrogated the statement in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly*, 550 U.S. at 561 (*quoting Conley*, 355 U.S. at 45-46). *Twombly* acknowledged that this language, in isolation, could mean that "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'some set of [undisclosed] facts' to support recovery." *Twombly*, 550 U.S. at 561 (alteration in original). However, *Twombly* did "not apply any 'heightened' pleading standard." *Id.* at n.14. The Court's "concern [was] not that the allegations in the complaint were insufficiently 'particular[ized]", rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible." *Id.* (alterations in original, citation omitted). That is not the case here.

In holding that taxation must always be reviewed under the rational basis test, it appears that the Federal Circuit applied a rational basis standard to determine whether Totes even stated a claim. *Totes-Isotoner Corp.*, 594 F.3d at 1354 ("[T]axation of property cannot discriminate between items of property of the 'same class,' [and] allegations of such discrimination are judged under the rational basis test."). In so holding, the Federal

Circuit incorrectly heightened the pleading standard, concluding that Totes failed to meet this burden and did not state a valid Equal Protection claim. Not only was this contrary to *Twombly*, which requires plaintiff to plead "with enough factual matter (taken as true) to suggest that" a claim is "plausible," *Twombly*, 550 U.S. at 556, it also illogically sets the pleading bar higher than what Totes would need to prove to succeed on the merits, *viz.*, intermediate scrutiny.

Totes has met the plausibility standard of *Twombly*. As discussed below, the legislative history to the HTSUS, including the Tariff Classification Study and congressional tariff hearings, support Totes' claims that gender- and aged- based tariffs violate the Equal Protection Clause. The legislative history presents "enough fact to raise a reasonable expectation that discovery [or further proceedings on the merits] will reveal evidence of illegal [conduct]," *Twombly*, 550 U.S. at 556, such that Totes stated a claim and the case should proceed to consideration on the merits.

III. Legislative History Supports Totes' Claims that the Gender- and Age-Based Tariffs Appearing in the HTSUS Violate the Equal Protection Clause.

A. The Tariff Classification Study Casts Doubt on the Justification for Duties Discriminating on the Basis of Gender or Age.

The Federal Circuit mistakenly ignored the Tariff Classification Study of 1960 when it concluded that alleged sourcing differences for men's and women's gloves negated Totes' argument that the tariff

discriminates on the basis of gender and age rather than between different classes of property. Pursuant to the Customs Simplification Act of 1954, the Tariff Commission was tasked with making "a comprehensive study of U.S. laws prescribing the tariff status of imported articles" and preparing "the [Tariff Schedules of the United States] and an accompanying report, the Tariff Classification Study." *Eastalco Aluminum Co. v. United States*, 916 F.2d 1568, 1569 (Fed. Cir. 1990). The Tariff Classification Study constitutes legislative history to the TSUS, the predecessor to the HTSUS, and is relevant to its interpretation. *See Nissho Iwai American Corp. v. United States*, 143 F.3d 1470, 1473 (Fed. Cir. 1998); *see also Lonza, Inc. v. United States*, 46 F.3d 1098, 1107 (Fed. Cir. 1995) (reviewing Tariff Classification Study to interpret a TSUS term carried over into the HTSUS).[7]

In discussing duty rates on footwear, the Tariff Classification Study highlighted the problems associated with gender- and age-based distinctions and cast doubt on the justification for duties discriminating on that basis:

> The proposed [TSUS provision] combines all McKay-sewed leather footwear in one tariff

7. This Court can take judicial notice of the Tariff Classification Study. *See Carolene Products Co. v. United States*, 323 U.S. 18, 28 (1944) (holding that this Court may take judicial notice of congressional reports that show the considerations that influenced legislation at issue); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2nd Cir. 2002) (in context of motion to dismiss, a court may consider matters of which judicial notice may be taken as well as documents in plaintiff's possession which are relied upon in bringing suit).

> provision at the rate of 20 percent ad valorem, thereby eliminating present distinctions . . . according to the age and sex of the wearer for which the footwear is designed. *These distinctions are often difficult if not impossible to make and their economic justification is questionable.*

Tariff Classification Study, Schedule 7, U.S. Tariff Commission 21-22 (1960) (emphasis added). Thus, the government itself questioned the economic justification of gender- and age-based tariff distinctions and recommended elimination of these distinctions. This official legislative history undercuts the Federal Circuit's reasoning that men's apparel is *prima facie* a separate and distinct commodity from apparel for women and children, and it also demonstrates that Totes has plead a "plausible" and legitimate equal protection claim that must withstand the government's motion to dismiss. *Twombly*, 550 U.S. at 556.

The Tariff Commission also questioned gender- and age-based tariff rate discriminations when it explained why the Tariff Commission established a single duty rate for cemented footwear in the TSUS:

> [W]e further propose that the rate of duty for column 1 on this new category, "cemented footwear," be 20 percent. . . . The present schedule provides under the classification of "Other," "If men's youth's or boy's [sic], 10 percent; if for other persons" - which would include women's - "20 percent." *And we feel that the [Tariff] Commission is acting wisely*

> *in its proposal to eliminate differentiation by gender, and we would not recommend continuing that differentiation,* and that is the reason why we have established the single rate for cemented footwear in our proposal.

Tariff Classification Study, Schedule 7, U.S. Tariff Commission 647 (1960) (emphasis added).

These passages from the Tariff Classification Study demonstrate that the government was acutely aware that gender- and age-based duty differences in the tariff could be problematic. The Tariff Commission's opinion that economic justifications for such gender- and age-based distinctions were "questionable," and its recommendation that the TSUS "eliminate differentiation by gender," indicate that the government cannot show that a higher tariff on men's gloves is substantially related to an important governmental interest under intermediate scrutiny. Nor can the government show that such gender and age distinctions in the tariff are even rationally related to a legitimate interest.

The Tariff Classification Study constitutes the government's own opinion concerning such distinctions and its language is a strong indication that duties discriminating on the basis of age or gender serve no legitimate economic purpose. Even if that were not the case, this legislative history proves that at the very least, Totes has identified evidence of allegedly illegal conduct and thereby stated a "plausible" equal protection claim pursuant to *Twombly*, 550 U.S. at 556.

B. Congressional Hearings on Tariffs Undermine the Federal Circuit's Assumption that the Current 1.4% Difference in Duty Between Men's and Women's Gloves Will Foster the Glove Industry Even if Rational Basis is Applied.

Tariff hearings before the Committee on Ways and Means of the House of Representatives, dating back as early as the 1890s, further undermine the Federal Circuit's reasoning that the government satisfied the rational basis test when considering whether "taxation of property . . . discriminate[s] between items of property of the 'same class.'" *Totes-Isotoner Corp.*, 594 F.3d 1346, 1354 (Fed. Cir. 2010). A review of those hearings reveals that no governmental interest is actually achieved by the current 1.4% difference in duty between men's and women's gloves. The hearings demonstrated that the duty rate on men's gloves would need to be increased *significantly* to foster, create or protect any current glove industry, thus dispelling any notion that a 1.4 percentage point differential would serve a protectionist interest that could somehow defeat Totes' claim for relief on a Rule 12(b) motion to dismiss.

As discussed above, the Federal Circuit incorrectly applied the rational basis test to Totes' pleading requirements. But, even if the Federal Circuit is correct that a rational basis test applies, the legislative history undermines the court's reasoning that a higher tariff on men's leather seamed gloves advances a governmental interest in protecting the glove industry. For example, in January 1897, during congressional tariff hearings, Mr. Lucius W. Littauer, a glove manufacturer in New York City, offered the following

written testimony about the effect of tariff rates on the glove industry at that time:

> In all tariffs up to 1890, gloves paid a rate of 50 per cent. The rate imposed, nevertheless, was simply a revenue duty, not sufficient to foster glove making in this country. . . .
>
> In the tariff of 1890 a composite specific and ad valorem rate was placed on gloves and advanced on former rates, but not high enough to permit the manufacture of ladies' gloves here. *The rates on men's gloves, were, however, advanced to 66 per cent [from 50 per cent], and there was immediately developed a large industry*, giving employment to thousands of working people.

Tariff Hearings Before the Comm. on Ways and Means, 54th Cong. 1927-28 (1897) (statement of Lucius W. Littauer) (emphasis added). This written testimony demonstrates that a tariff rate as high as 66%, an increase of 16 percentage points from the established rate (and the women's rate), was required to foster and protect the men's glove industry in the 1890s.

Similarly, in 1909, the Glove Manufacturers' Association of the United States discussed at length the history of tariffs on gloves and the need for a significant increase in the duty rate on men's gloves to create and promote the men's glove industry:

> Before the McKinley Act of 1890 there was no glove industry in the United States competing in our markets with the foreign-made gloves. . . .

> In the consideration of the McKinley bill the question of giving protection, so as to build up an American industry, was thoroughly investigated, with the conclusion that such opportunity was given on men's gloves, while leaving the women's gloves on a purely revenue basis. . . . *The McKinley bill imposed, in addition to the previous 50 per cent ad valorem rate, $1 per dozen extra on men's gloves. From the date of its enactment the American fine-glove industry had its start. . . .*
>
> *The Wilson bill of 1893 for the first time placed exclusively specific duties on gloves, and moreover, after the fullest and most careful study of the problem, gave increased rates of duty on men's gloves, while lowering the duty on women's gloves, in specific form, to about one-half the rates which maintained under the McKinley bill. . . .*
>
> When the Dingley Act of 1897 was under consideration these facts were clearly presented, and a demand was made for the continuance of the duties on men's gloves which was agreed to.

Tariff Hearings before the House Comm. on Ways and Means, 60th Cong. 7120-21 (1909) (statement of the Glove Manufacturers' Association of the United States) (emphasis added).

Like the 1897 testimony of the members of the glove industry, the 1909 testimony of the glove manufacturers' association also shows that significant increases in the duty rate were needed to foster the men's glove industry. The testimony makes clear that it was not until large increases in the tariff were enacted that the domestic industry bloomed. Indeed, to foster the industry, more than one significant increase in duty was enacted between the 1890 McKinley bill and the 1897 Dingley Act.

Such a small difference in duty rates between men's and women's gloves bears no meaningful relation to the domestic glove industry. If in the late nineteenth and early twentieth centuries a duty increase of 16 percentage points and a $1.00 per dozen were required to create, foster and protect a domestic men's glove industry, then it is impossible for a 1.4% difference in duty to protect any men's glove industry in the United States today, or otherwise to be substantially related to serving a legitimate governmental interest.[8] The Federal Circuit was incorrect to conclude otherwise, and should certainly not have used a merits-based rational basis test to conclude that Totes' failed to state a claim of gender discrimination that would be reviewed under intermediate scrutiny on the merits.

8. To date, there has been no suggestion by the parties or the lower courts that a domestic glove industry even exists today, let alone one that could be impacted by the small duty differential at issue in this case.

CONCLUSION

For the foregoing reasons, *amici curiae* Columbia Sportswear Company, Mountain Hardwear, Payless ShoeSource, Inc., The Stride Rite Corporation, and Mia Shoes, Inc., respectfully urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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